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HESSEL E. YNTEMA

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(*continued*)

GIOVANNI CASSANDRO

The Constitutional Court of Italy

1. The system of constitutional guarantees introduced by the Italian Constitution and by the laws, constitutional and ordinary,[1] by which it is implemented, consists primarily in the establishment of a Court with exclusive jurisdiction to determine the conformity of legislation to the Constitution. The Court is empowered to pass upon the constitutional legality of statutes and to declare their inefficacy *erga omnes;* its judgment is not subject to review of any kind.[2] In inspiring motive, if not in technical details, such a system can be traced back to a renowned ancient doctrine, which began to form itself almost at the

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Translation by Giuseppe Bisconti, LL.M., Dr. Giur., Member of the Rome bar.

[1] A constitutional law is one directly affecting the Constitution. It requires for its approval a more exacting procedure, as explained *infra,* at p. 3 (Const. Art. 138). An ordinary law is one requiring for its adoption the presence of a majority of the members of each House and approval by a majority of those in attendance (Const. Art. 64).

[2] Provisions relating to the Constitutional Court are found in Arts. 127, 134–137 of the Constitution (1948); in the constitutional laws (l.c.) of February 9, 1948, n.1 and of March 11, 1953, n.1; in the ordinary laws (l.) of March 11, 1953, n. 87 and of March 18, 1958, n. 265; in the Norme integrative per i giudizi davanti alla Corte costituzionale (Implementing Provisions on the Proceedings before the Constitutional Court), approved by the Court on March 16, 1956 (published in Gazzetta Ufficiale of March 24, 1956); in the Regolamento Generale (General Regulations) of the Constitutional Court of April 22, 1958 (published in Gazzetta Ufficiale of May 3, 1958).

The Court publishes its judgments and ordinances in a collection printed by the Libreria dello Stato under the title: Raccolta Ufficiale delle Sentenze e Ordinanze della Corte Costituzionale. Four volumes have appeared to date.

The legal literature on the Constitutional Court is already vast. It suffices here to cite the following general works: Balladore Pallieri, G., Diritto Costituzionale[5], Milano, 1957; Biscaretti di Ruffia, P., Diritto Costituzionale[4], Napoli, 1956; Cereti, C., Corso di diritto costituzionale italiano[5], Torino, 1958; Crosa, E., Diritto costituzionale[4], Torino, 1955; Mortati, C., Istituzioni di diritto pubblico[4], Padova, 1958. In addition to these, see also: Abbamonte, G., Il processo costituzionale italiano, Napoli, 1957; Azzariti, G., "Legittimità costituzionale," in Enciclopedia Forense, Vallardi, Milano; Brunori, G., La Corte Costituzionale, Firenze, 1952; Brusca, A. and F., La Corte Costituzionale, Roma, 1953; Cappelletti, M., La pregiudizialità costituzionale nel processo civile, Milano, 1957; Curci, P., La Corte Costituzionale, Milano, 1956; Garbagnati, E., "Sull'efficacia delle decisioni della Corte costituzionale," in Studi in onore di F. Carnelutti, IV, Padova, 1950, p. 902 ff.; Liebman, E. T., "Le norme integrative per i giudizi davanti la Corte costituzionale," in Mon.Trib., 1956, I, p. 33 ff.; *idem,* "Contenuto ed efficacia delle decisioni della Corte costituzionale," in 12 Riv. di dir. proc. (1957) 507 ff.; Redenti, E., Legittimità delle leggi e Corte costituzionale, Milano, 1957; Stendardi, G. G., La Corte costituzionale, Milano, 1957; Tesauro, A., "La Corte costituzionale e i reati del Presidente della Repubblica e dei membri del Governo," in Foro Penale, 1951, p. 141 ff.; Villari, S., Il processo costituzionale, Milano, 1957; Virga, P., "I reati ministeriali," in Ius, 1954, p. 80 ff. See also: Farrelly, D. G. and Chan, S. H., "Italy's Constitutional Court: Procedural Aspects," 6 Am. J. Comp. L. (1957) 314; Dietze, G. "Constitutional Courts in Europe," 60 Dickinson Law Rev. (1956) 313.

same time as the written constitutions of the end of the XVIIIth century. To my knowledge, it found its first clear formulation in the dramatic alternative posed by Marshall, C. J.

> "The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.
>
> "If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."[3]

It does not seem to me that the statements of European jurists differ in substance from what was proclaimed with such solemnity by Marshall, C. J. This, whether they regard the subordination of the ordinary laws to the norms of the Constitution as the fullest development of the rule of law, by which the *stato di diritto* reaches its highest peak, obliging the legislator, heretofore thought of as *legibus solutus,* to act in conformity to law and providing legal sanctions against his acting contrary thereto. Or whether, employing a more refined legal technique, they derive rules and procedures of constitutional protection from a general, hierarchical system of sources of legislation, in consequence of which a norm of lower degree may not trespass the limits set by a higher norm and if such limits are not observed, may be declared invalid.

However, the idea of subjecting ordinary laws to review on their conformity to the Constitution—or, in other words, of enforcing the "superiority" of the fundamental law—is new in Europe, and absolutely new in Italy. Even before this idea was affirmed and translated into concrete legal institutions, as occurred after World War I, there was not totally lacking a belief in the existence of fundamental rules which may not remain unheeded or which may be overlooked only under fixed conditions and subject to the observance of rigorous procedures. Indeed, if one delves deeply enough in the history of Western political thought and of European legal systems, this belief may be found in the guise of various formulations. It was the basis of the distinction, of Aristotelian origin, between ordinary regimes and their degenerations, as well as the antinomy *princeps-tyrannus.* It would be most interesting to investigate more thoroughly, though some examples are not lacking, the legal-historical events of the West during the Middle Ages in order to ascertain in what degree this exigency of the subjection of the *"princeps"* as legislator and judge to the *"lex"* was not merely a doctrinal statement, but an effective reality, not only in the political sphere where the king was bound to reckon with feudal or

[3] Marbury v. Madison, 1 Cr. 137, 175 (1803).

city forces, but also on a more strictly legal level. It would also be interesting to note how such limitations of the royal power found their roots, at least on the European continent, in natural law; and also to investigate how far natural law ideas influenced both the first and most ancient "constitutional charters" and "declarations of rights" and also the more recent conceptions of constitutional guarantees, including those based on general theories of law which openly and strongly oppose natural law. The spirit of the latter—to use Gierke's words—hovered and still hovers above the so-called rigid constitutions, which posit fundamental rules destined, not otherwise than natural law, to serve as a model and a limit to positive ordinary laws. The difference, which, however, is fundamental, is that nonobservance of these rules in contemporary legal systems, determines the application of legal and not of merely moral *"in foro conscientiae"* or political sanctions. If one still wants to refer to natural law, one ought to say that it has been transformed into positive law.

However, this is not the place to conduct such a research; nor to explore the influence exercised by distant traditions and aspirations or by modern public law conceptions on the framers of the Italian constitution. But one cannot avoid saying that the determining weight in inducing the Italian legislator to adopt a system of constitutional guarantees, is to be found not only in these traditions and conceptions or in the example of other European constitutions, almost all of which were wrecked in the period between the two world wars, but also in the aspiration generally felt in a country which had just completed a totalitarian experiment, to see that the fundamental freedoms of the citizen be protected and defended, as far as human foresight can provide. Jurists interpreted this aspiration and supplied the appropriate technical answer.

2. The Italian constitution is a "rigid" constitution. This, as is well known, does not mean that it is immutable, but that it may be amended only pursuant to special and rigorous rules. These rules require a double approval by each of the two Houses. An interval of not less than three months must elapse between the two votes, and a majority of members in both branches of Parliament is required in the second vote (Art. 138 of the Constitution). If in the second vote the constitutional amendment[4] does not obtain two thirds of the votes of the members of each House, it may be submitted to the people by *referendum* within three months from its publication, and upon request of a fifth of the members of one House or of 500,000 electors or of five regional councils.[5] Should such procedural requirements not be ful-

[4] The same rule applies to a constitutional law which, though not amending the Constitution, governs matters within the constitutional sphere and implements or supplements the provisions contained in the fundamental charter.

[5] This provision of the Constitution has no application, since the law implementing

filled, a law governing constitutional matters or amending the Constitution—even with the heading of a "constitutional law"—would not be valid as such. It could be declared invalid by the Constitutional Court, which is the only organ having jurisdiction to render such a judgment.

However, the judicial review of constitutional legality reserved to the Court is not limited to control of the formal legality of constitutional laws, but also extends to ordinary laws. Such control can be twofold; i.e., not only formal, or directed, as it is said, to ascertain whether the pertinent constitutional norms have been respected in the law-making process,[6] but also material, namely, directed to ascertain the conformity in substance of the law to the commands of the Constitution. The latter type of review is the more delicate and difficult; the more so in view of the fact that the Italian constitutional charter contains not only provisions of an imperative and immediately executory nature but also provisions that state principles or establish directives which should inspire the legislature. The prevailing doctrine, supported by the constant jurisprudence of the Court, considers provisions of the latter category as being of the same nature as those of the former, and not as a sort of "superlaws" existing on a higher level than other laws and incapable of conflicting with them.

The term "law," moreover, may be and is actually used to indicate categories broader than that of laws in a formal sense, voted by Parliament and promulgated by the Chief of State. Regional laws[7] are also laws, even though Italian legal writers are not agreed that they are "formal" laws. It is also recognized that "acts having the force of law," such as those issued by the Government either on the basis of delegation by Parliament[8] or on its own initiative in urgent cases, have

Art. 75 Const. has not yet been passed. Under Art. 75, this should determine the "modalities of execution of the *referendum*." Besides, regions—as provided for by Const. Art. 114 ff.—have not yet been created.

The Regional Council is the organ exercising the legislative and regulatory powers attributed to the Region and all the other functions conferred on it by the Constitution and by the laws. It may propose bills to the Houses (Const. Art. 121).

[6] The determination of the limits of review by the Court of the formative process of legislation (the legislative "will") or, what amounts to the same thing, the definition of the concept of *interna corporis,* is a controversial question. On this point, the opinion of the Constitutional Court does not coincide with that of the Chamber of Deputies.

[7] The Constitution introduced Regions into the Italian legal system. A Region is an entity to which legal personality and administrative and legislative autonomy are attributed under public law principles. The Italian State is not thereby deemed to be a regional state; at most, Regions are ascribed distinctive importance within the constitutional structure of the State (a constitutional "relevancy"). On the other hand, until now only four Regions have been created (Sicily, Sardinia, Aosta Valley, Trentino-Alto Adige) in consideration of historical and political reasons. Special autonomy has been granted to them, regulated by "statutes" "adopted" by means of constitutional laws (Const. Art. 116).

[8] The Constitutional Court, in its judgment of January 16, 1957 (Racc. Uff.Sent. e Ord., II, 3, p. 21 ff.), solved the previously highly controversial question of the admis-

the substantive nature of law. In the latter case, such acts must be submitted to Parliament within five days for conversion into law.[9] The review of constitutional legality also extends to such laws and acts.[10]

Finally, the review of constitutional legality covers not only laws promulgated after the Constitution went into effect (January 1, 1948), but also those preceding it. The Court thus solved a problem which had already been widely debated before its creation.[11] It based its judgment primarily on the argument that the chronological relation between the Constitution and an ordinary law (which might have suggested a procedure for abrogation of antecedent laws) loses relevancy in comparison with the logical and systematic relation between a higher source of law and a lower one. The latter type of relation requires a declaration of unconstitutionality whenever a conflict exists between them, independently of the date of the law. This problem is present in all, or in the majority of the postwar legal systems of European states, which did not make a *tabula rasa* of anterior laws and institutions but preserved them in great part, subjecting their validity, however, to their conformity to the new constitution. For this reason, it seems to me that Kelsen's theory that the extension of constitutional jurisdiction to laws preceding the enactment of the Constitution is not logically necessary, cannot be accepted even on a merely theoretical level (i.e., independently of the practical difficulties presented by the contrary solution).

3. The procedure by which the Constitutional Court is empowered to review the legality of laws and acts having the force of laws, is, so to say, an indirect procedure. The Italian Constitution does not contemplate that an action seeking constitutional review may be brought directly by a citizen or a group of citizens, or by a certain number of members of Parliament or the Government. The issue of constitutional validity may be raised only in the course of a judicial proceeding, in which the challenged law is to be applied, either upon petition of one of the private parties or of the *pubblico ministero,* or on initia-

sibility of the review of the constitutional legality not only of the delegation law but also of the authorized act (*legge delegata*). The Court solved it in the affirmative sense and held that an authorized act which does not observe the limits imposed by Parliament on the Government in the delegation law (Const. Art. 76), though not immediately in conflict with the Constitution, ends by violating it; a delegation is valid insofar as the delegated power keeps within the assigned limits. Legislative delegation is a unitary process bearing on the constitutional norm, the delegation law, and the authorized act.

[9] The term of five days within which a decree-law must be submitted to Parliament and that of sixty days within which Parliament must convert into law the decree, which would otherwise lose its efficacy *ope legis,* are so short that the hypothesis of a review of the constitutional legality of the decree-law may be considered as merely academic. The conversion into law of a decree, in addition to that caused by the mandatory term of sixty days, presents other interesting problems on which the Court has not yet had an opportunity to declare its judgment.

[10] Const. Art. 134.

[11] *Racc. Uff. Sent. e Ord.,* I, 1, p. 25 ff.

tive of a court. If the judicial authority (*autorità giurisdizionale*), ordinary or administrative, grants the request or on its own initiative finds that there is present an issue of constitutional legality of a law, it suspends the proceeding and by an order (*ordinanza*) transfers the record to the Court. But it is necessary that two conditions be present. The first is that, upon summary examination, the issue prove not to be manifestly unfounded; the second that it be in the nature of a "prejudicial" question, which in the instant case means that the lawsuit cannot be adjudged without recourse to the challenged law.[12] The judge in the proceeding *a quo* is competent to decide the existence of either condition. But the Court repeatedly has stated that the "relevancy" of the issue to the adjudication or, in other words, its "prejudicial nature" must be motivated, and invariably remands the record to the judge *a quo* whenever this motivation is not even implicitly contained in the order of transfer, or whenever it indicates that the issue was not what it was made to appear, namely, of a prejudicial nature.

However, once the issue of constitutionality has reached the Court, the latter is bound to adjudge it even if the parties to the proceeding *a quo* do not appear, and even if the President of the Council of Ministers, to whom the order of transfer must be notified and who, as it were, has the role of the defender of the law in the constitutional process, does not appear. Moreover, the proceeding before the Court, once validly initiated, continues until its conclusion, whatever may be the fortunes of the proceeding in the course of which the issue of constitutional legality was raised, even if the latter was terminated for any reason.[13] The public and general interest in the certainty of law, which dominates the entire constitutional process, prevails over the private interest of the parties.

The Court may declare that the issue raised as to constitutional legality is unfounded (*infondata*) or that the law is constitutionally invalid. The first of these two declarations does not have the effect of *res judicata:* the same issue may be submitted again to review by the Court under different aspects, and the new proceeding may end with a declaration of invalidity. The second renders the law without effect from the day after that of its publication in the *Gazzetta Ufficiale*[14] (the journal in which the laws and decrees of the Republic are published) with a constitutive, but also partly declaratory, effect.[15] Indeed, it is not questioned that the Court's judgment takes effect as

[12] Art. 1,1.c. of February 9, 1948, n.1, and Art. 23 of Law of March 11, 1953, n.87.

[13] *Norme Integrative,* Art. 22.

[14] Const. Art. 136. The text uses the expression: "the norm ceases to have effect . . ."

[15] For the meaning of the expressions "constitutive" and "declaratory" see: Kelsen, General Theory of Law and State, Cambridge, Mass., 1946, p. 135; Borchard, Declaratory Judgments, 2nd. ed., Cleveland, 1941, p. 22 ff.

respects legal relations initiated under the invalid law and not yet concluded or extinguished. Moreover, a statutory provision expressly states that in case an irrevocable sentence is rendered "in application of a provision of law which has been declared unconstitutional" its execution and all its penal effects cease.[16]

4. In addition to the above-described procedure by way of an "incidental action," State and regional laws may be challenged directly before the Court by a Region or by the State, respectively, whenever a region deems that a law, or an act having force of law, of the Republic "invades the sphere of authority attributed to it by the Constitution," or whenever, on the other hand, the State regards a regional law as exceeding the authority of the Region.[17] Such action by the State forms part of the formative process of regional laws, as the Constitution provides that every law approved by the Regional Council must be communicated to the Commissioner of the State for that Region,[18] who must visa it within 30 days. When the Government of the Republic considers that there has been an instance of infringement by the Region of its own sphere of authority, the law is remanded within said term of 30 days to the Regional Council for a second examination. Only when the latter again approves the law by an absolute majority of its members, may the State Government raise the issue of constitutional legality before the Court.[19] The same procedure must be followed if the government deems the regional law, though unquestionable from the viewpoint of constitutional legality, to conflict with the national interest or with the interests of other Regions. However, Parliament has jurisdiction in such a case, and the Court intervenes only when there is a question between the State and the Region as to the nature of the controversy, namely, whether it is one of constitutional legality or not, and decides in whose jurisdiction it is, whether its own or that of Parliament.[20]

The proceeding initiated between the State and a Region is in a sense adversary, while the case when the proceeding is brought by way of an incidental action is not. The consequence is that in the former proceeding the will of the parties has a weight not recognized in the latter, and may bring about the extinction of the proceeding.

[16] Art. 30, last paragraph, Law of March 11, 1953, n.87.

[17] Art. 1 and 2,l.c. of February 9, 1948, n.1. A regional law may be challenged before the Court on the ground of constitutional illegality also by another Region "which deems that its authority is violated by such law"; Art. 2^2,l.c. of February 9, 1948, n.1, *cit.*, and Art. 33, Law of March 11, 1953, n.87.

[18] The Commissioner of the State supervises, on behalf of the national government, the administrative functions exercised by the State in the Region and co-ordinates them with those exercised by the Region (Const. Art. 124).

[19] Const. Art. 127; Art. 31, Law of March 11, 1953, n.87.

[20] Const. Art. 127^4 and Art. 35, Law of March 11, 1953, n.87.

"Waiver of the action," provides Art. 25 of the *Norme Integrative,* "if accepted by all parties, extinguishes the proceeding.

Until the Court's judgment of February 27, 1957,[21] jurisdiction over controversies of constitutional legality between the State and the Region of Sicily was exercised by a special court called the "High Court for the Region of Sicily."[22] In that judgment, the Court held that the jurisdiction of the High Court for Sicily had been created provisorily before the enactment of the Constitution and had to be considered as a transitory one, i.e., valid until the coming into existence of the Constitutional Court which absorbed it into its broader and more comprehensive jurisdiction. The decision was supported on the ground of the necessary unity of the constitutional jurisdiction and unitary structure of the State, upon which, in turn, the former is based.[23] However, the rules of procedure once in effect before the High Court for Sicily (which differ from those established for all Regions by the Constitution and later laws: no visa by the Commissioner of State nor a second decision by the Regional Council are required; the action may be brought by the Commissioner of State and not by the Government; shorter terms; etc.) continued to be applied before the Court, which affirmed their conformity with the unity of the judicial institution of constitutional review.

A conflict between the State and a Region may also arise if the State invades the sphere of authority of a Region or if a Region exceeds its own sphere, not by legislative action but through an administrative act. Such a conflict is called by the law *conflict of attribution* (*conflitto di attribuzione*). Jurisdiction to solve it rests with the Constitutional Court, which in the first place declares to which of the two the challenged authority pertains and, in the second place, annuls any administrative act issued by an incompetent "organ."[24]

5. The same term "conflict of attribution" is used by the law to indicate those conflicts which may arise among the powers of the State "for the delimitation of the sphere of attributions determined

[21] *Racc. Uff. Sent. e Ord.,* II, 38, p. 375 ff.

[22] The High Court was created by the Statute (*Statuto*) for the Region of Sicily (Art. 24–30), approved by legislative decree of May 15, 1946, n.445, converted into l.c. of February 26, 1948, n.2. Other provisions relating to the High Court were issued by legislative decree of the Provisional Chief of State of September 15, 1947, n.942, and deal with the formation of the Court and the rules of procedure which must be observed before it.

[23] The Court also held that the particular jurisdiction of the High Court to pass upon the constitutional legality of regulations (*regolamenti*) issued by the State—which was specifically provided for in the *Statuto* for the Region of Sicily (Art. 25,(b)) and represented another peculiarity in the determination of the reciprocal spheres of authority of the State and the Region of Sicily—was also absorbed in its own general jurisdiction to adjudge conflicts of attribution between the State and a Region.

[24] Const. Art. 134; Art. 39–42, Law of March 11, 1953, n.87, and Art. 38 of the same law.

for the various powers by constitutional norms."[25] Statutory provisions on this point are very scarce. They limit themselves to providing that the issue of conflict may be raised by the organ having ultimate authority to declare the will of the power to which it belongs; that before initiating the proceeding the Court decides by its order the question of the admissibility of the complaint, that is to say, it decides whether the subject matter presents a conflict whose solution lies within its jurisdiction; that only thereafter may the Court order that notice of the complaint be served upon the interested organs. After hearing the parties, the Court decides to which one of the conflicting "organs" the challenged power belongs and, here again, annuls any administrative act illegally issued.[26] Nothing more is provided. Therefore, it is the task of the Constitutional Court (until now no opportunity therefor has arisen) to implement this barely outlined system and to solve all the difficulties which it offers to its interpreter. In the first place, it must determine which are the powers of the State and how the formulation of the law should be understood today, now that the ancient traditional trichotomy seems to many jurists to be insufficient to embrace the constitutional organs of the State. In consequence, it must decide whether there may be a conflict between constitutional organs such as, e.g., the Chamber of Deputies and the Senate, both belonging to the same power; or whether a conflict is thinkable between the President of the Republic and Parliament or one of its branches, when strictly speaking the President cannot be classified in any of the three powers of the State and many jurists deny that there may be a "presidential power" as such.

There has been, as yet, no possibility for the Court to exercise the jurisdiction to pass upon the admissibility of the request for an abrogative *referendum,* as the law referred to in the last paragraph of Article 75 of the Constitution, which is to govern the modalities of the referendum, has not yet been approved.[27]

Finally, the Court has jurisdiction to try cases of impeachment of the President of the Republic for crimes of attempt on the Constitution and high treason, and against the President of the Council of Ministers and the Ministers for crimes committed by them in the ex-

[25] Art. 37[1], Law of March 11, 1953, n.87.

[26] *Cf.* the above cited Art. 37, Law of March 11, 1953, n.87, and Art. 38 of the same law.

[27] In addition to the *referendum* which may be petitioned for a constitutional law or for one of constitutional revision which has not obtained in the second vote the approval of two thirds of the members of each House (Const. Art. 87[6]), and to the *referendum* on the separation of provinces and townships from the Region to which they belong (Const. Art. 132), the Constitution provides for a *referendum* for the abrogation of ordinary laws, with the exception of taxation and budget laws, laws granting amnesty and pardon, and laws authorizing the ratification of internal treaties. (Const. Art. 74 and 75; Art. 2,l.c. of Law of March 11, 1953, n.1.)

ercise of their functions. In these cases, the Court is enlarged by 16 lay judges (*giudici popolari*) drawn from a list of persons elected by Parliament at the beginning of the legislative term. An impeachment is brought and prosecuted by Parliament, which votes on it in joint session. In this area, the powers of the Court are particularly grave. Not only shall it define the crimes of attempt on the Constitution and of high treason, which are notions bereft of any rigorous legislative definition, but it shall also determine, in the case of "presidential" as well as in that of "ministerial" crimes, "the constitutional, administrative and civil sanctions adequate for the fact"; and in the case of a particular gravity of "ministerial" crimes, it has the power to increase the penalty beyond the maximum provided by the criminal laws.[28] For this reason, Italian doctrinal writers have spoken of justified derogations to the fundamental principle of criminal law *nullum crimen et nulla poena sine lege.*

6. The novelty of this complex system of constitutional quarantees, which the establishment of the Court has rendered effective, explains not only why there is no agreement on the specific issues of substantive and adjective law, but also why we are still so far from a common opinion on the nature of the Court's powers and, consequently, on its role and position in the framework of the powers of the State. Obviously, the first solution to be proposed, suggested by the form of the Court's activity and by the very language of the law, was that of considering the Court as a judicial organ and to place it—albeit in a special and eminent position, and without forgetting some of its characteristics—among the organs entrusted with the judicial function. Though this opinion, once dominant, still finds many followers, even before the coming into existence of the Court, which marked a delay of eight years after the adoption of the Constitution, doubts on its exactitude were not wanting, which doubts in the course of time became more consistent and widespread. In 1950, a distinguished Italian jurist, Piero Calamandrei, wrote: ". . . notwithstanding the ingenious justifications of lawyers, from the political angle the Constitutional Court will appear to public opinion as a sort of superparliament placed above the legislative Houses,"[29] and underlined the peculiarity of an organ which some sought to characterize as a judicial organ, but which adjudicated not *secundum leges* but *de legibus* and had the power to declare the invalidity of a statute *erga omnes.* This thesis—which Calamandrei submitted almost timidly, considering the problem from the political angle—as is known, had already been argued by Kelsen in the field of general theory of law. According to the latter, when the review of conformity of an inferior norm to a superior norm is

[28] Const. Arts. 16, 10, and 134; Arts. 11–13 and 43–52, Law of March 11, 1953, n.87.
[29] La illegittimità costituzionale delle leggi nel processo civile, Padova, 1950, p. 75.

entrusted to a special organ, and such review may bring about the annulment of the law, the organ empowered with this function poses itself by this very and only fact above the legislative power as a superlegislator.[30] However, despite such authoritative derivation, it cannot be said that the thesis of the legislative or superlegislative nature of the Constitutional Court has been successful. Doctrinal writers, persuaded by the impossibility of using old barrels for new wine or, metaphors aside, of adopting the old schemes in order to define a new reality, have explored and are still exploring new avenues. It seems to me that an accord, at least on what the Court is not, has been reached or is about to be reached, to the extent that more and more explicitly the difficulty is acknowledged of characterizing the role of the Court by reference to any of the traditional functions of the State. It is argued that, besides these, other functions have appeared or that the former should be construed in a way more apt to interpret and systematize the reality of the new Italian State.

Thus, assuming the existence of a "constituent legislative function" other than the ordinary legislative function, which, truly at the summit of the "hierarchy of all the other functions of the State," is the only really sovereign one as being not subject to any control, it has been stated that "the activity of the Constitutional Court" is closely connected with this new state function, in the exercise of which it seeks to guarantee the rigid character of the Constitution.[31] Other writers, on the contrary, consider the Court's activity as one of control of the constitutionality of the laws. They conceive the function of control as a logical activity of a general nature which, as such, manifests itself through acts that do not belong specifically to any of the traditional fundamental functions of the State but are to be characterized in each instance according to the nature of the act controlled. Therefore, they reach the conclusion that, whatever be the form of the acts of the Court, in substance it fulfills a function on the legislative level through acts of negative legislation.[32] Others, finally, think they can find in the Italian legal system a "function of general political or constitutional direction" other than the "function of political direction of the majority," designed to guarantee the accomplishment of the permanent ends of the Constitution. These place the Court among the constitutional organs entrusted with this new function.[33]

This is not the place to examine which one of these theories is

[30] General Theory, *cit.*, p. 155 ff.

[31] G. Azzariti, "La posizione della Corte costituzionale nell'ordinamento dello Stato italiano," in Studi sulla Costituzione, 1958, III, p. 447–463, esp. at p. 462–463.

[32] *Cf.* C. Cereti, "Funzione legislativa e controllo di legittimità," in 8 Riv. trim. di dir. pubblico, 1 (1958), pp. 27–61.

[33] P. Barile, "La Corte costituzionale organo sovrano: implicazioni pratiche," in 2 Giurisprudenza costituzionale, 3–4 (1957), p. 907–922; *idem*, "I poteri del Presidente della Repubblica," in 8 Riv. trim. di dir. pubblico, 2 (1958), p. 295–357.

correct, i.e., which one is better suited to interpret and represent the reality of the Italian constitutional system; I must limit myself to the statement that the vagueness of some approaches, the inexactitude of some definitions, and the difficulties inherent in some distinctions, arouse reasonable doubts as to the full validity of each theory. On the other hand, it seems to me that some conclusions may be drawn from the preceding exposition. The first is that the court is a sovereign constitutional organ, in the sense usually given to the expression "constitutional organ,"[34] viz., an organ essential to the life and development of the functions of the State, created by the Constitution itself in which it finds the immediate source of its existence and of its attributions, autonomous and independent from every other organ, even though other organs may appoint or elect its members, exercising its own function, determined solely by its own will. The second conclusion helps to clarify the significance of the Court within the system of the Italian State and to justify the current statement that together with the President it gives a peculiar trait to the Italian Constitution. This is not a rigorous legal definition, but a sufficiently indicative statement of the reality, which can be formulated as follows. The Court is the constitutional organ which secures the balance among the various powers of the State, preventing any one of them from trespassing the limits imposed by the Constitution, and thus ensures an orderly development of public life and the observance of the constitutional rights of citizens. Such a statement, it seems to me, appropriately embraces all the attributions conferred upon the Court, those relating to the judicial review of constitutional legality of laws as well as those relating to conflicts of attribution, and even, perhaps, those relating to the trial of "presidential" and "ministerial" crimes.

7. This barely outlined definition of the powers and nature of the Court is confirmed not only by its attributions of authority as described above, but also by the provisions which govern its composition and the exercise of its nonjudicial activity, and by the guarantees accorded to the justices who form the Court.

The Court consists of fifteen judges appointed or elected in equal numbers: (a) five by the supreme judicial orders (three by the Court of Cassation, one by the Council of State, one by the Court of Accounts) chosen among members of the judiciary, even if retired; (b) five by Parliament sitting in joint session, by a majority of three fifths of the members of the Assembly, or, if the first vote fails, by three

[34] *Cf.*, e.g., O. Ranelletti, Istituzioni di diritto pubblico, II–IV, Milano, 1954, p. 299. The above formulated conclusions need not be changed if—following Barile, La Corte costituzionale, *cit.*, p. 908–909—it is held that a constitutional organ: (a) is a necessary element of the legal system; (b) cannot be replaced by other constitutional organs; (c) has a structure provided entirely by the Constitution; (d) is in a position of equality with the other constitutional organs.

fifths of the voting members, chosen from judges, ordinary professors of law in universities, lawyers having practiced twenty years or more before the supreme judicial organs of the Republic; (c) five by the Chief of State, chosen within the same categories.[35] Once elected or appointed, they are sworn in by the President of the Republic in the presence of the President of the Senate and of the President of the Chamber of Deputies.[36] However, the Court alone has jurisdiction to pass upon the validity of their title,[37] and to determine their removal or suspension from office because of supervening physical or civil incapacity or because of grave neglect in the exercise of their functions.[38] They are not subject to any judgment for opinions expressed in the exercise of their office[39] and enjoy the immunity secured to members of Parliament by Art. 68^2 of the Constitution, by which they may not be arraigned before a criminal court nor arrested without the authorization of the Court itself.[40] They hold office for a term of twelve years.[41] A consequence of the special condition enjoyed by the justices is the compact series of prohibitions which they must observe. They may not exercise any activity in a political party or association, nor be candidates in political or administrative elections; they may not take or maintain other offices or employments, whether public or private, nor exercise any professional, commercial, or industrial activity, nor fulfill functions of directors or syndics in associations organized for purposes of profits; those among them who are judges or university professors are suspended in such functions for the whole period during which they remain in office.[42]

The independence of the Court is further guaranteed: (a) by the designation to it by statute of a permanent seat (the ancient palace of the *Consulta*), within which it exercises police powers and admittance to which is forbidden to the police unless by order of the President of the Court;[43] by the power to discipline, through regulations approved by a majority of its members, the exercise of its functions;[44] (c) by the exclusive jurisdiction which it exercises over its own employees,

[35] Const. Art. 135; Arts. 1–4, Law of March 11, 1953, n.87.
[36] Art. 5, Law of March 11, 1953, n.87.
[37] Art. 3,l.c. of Law of February 9, 1948, n.1 and Art. 3,l.c. of Law of March 11, 1953, n.1.
[38] Art. 1 and Art. 3^2, l.c. of Law of February 9, 1948, n.1, and Art. 7,l.c. of Law of March 11, 1953, n.1.
[39] Art. 5.l.c. of Law of March 11, 1953, n. 1.
[40] Art. 3^3, l.c. of Law of February 9, 1948, n.1.
[41] Const. Art. 135^4; Art. 4, l.c. of Law of March 11, 1953, n.1, which also determines the rules for the partial renovation of the Court after the first 12-year term has elapsed.
[42] Const. Art. 134 and Art. 7,l. of Law of March 11, 1953, n.87.
[43] Art. 1,l of Law of March 18, 1958, n. 265; Arts. 1 and 2, Regolamento generale della Corte, *cit.*
[44] Art. 14^1,l. of Law of March 11, 1953, n.87.

whose career and economic conditions it determines;[45] (d) by the autonomous administration of the funds allocated to it in the budget of the State by an act of Parliament.[46]

8. It is too early to state whether the Constitutional Court has fulfilled the expectations of those who regarded it as the most unwavering guardian of constitutional freedoms, or has dispelled the worries of those who, attached to the old conception of the sovereignty of the legislative power, opposed its creation. Such a judgment, besides being untimely, for obvious reasons may not be expressed by this writer. He may, however, observe that the Court, through the rhythm of its work, the equilibrium of its decisions, and the volume of its jurisprudence, has won the respect of public opinion and the prestige indispensable for effective fulfillment of its function. I well know that neither legal norms nor even solemn declarations of constitutional charters are sufficient to ensure a peaceful solution of the eternal conflict in the life of the State between liberty and authority or, what is the same, between conservation and progress, to whose solution the court's activity is ultimately directed. Peoples on the European continent have bitterly experienced on various occasions the frailty of legal orders which did not have the support of a firm moral conscience constantly operative in the life of the national community. Liberty is a good—as the poet said —which must be conquered every day. But a Constitutional Court, conscious of its duties and capable of well exercising its powers, can serve to create such a conscience, to strengthen it, to perpetuate it: *quod est in votis.*

[45] Art. 14,l. of Law of March 11, 1953, n.87, as amended by Art. 4,l. of March 18, 1958, n.265.

[46] Art. 14^2, l. of Law of March 11, 1953, n.87.

ROBERT E. CLUTE

Law and Practice in Commonwealth Extradition

Two systems of law touching affairs between states figured in the legal development of the Commonwealth of Nations. The one controls many facets of the relations of member states (sometimes former member states) *inter se* and might be called "Commonwealth Law."[1] The other is international law which sometimes regulates relations between Commonwealth countries, and normally operates between Commonwealth countries and foreign states. The former often is based on imperial statutes or customs which regulated affairs between component parts of the British Empire prior to their emergence as independent nations and are in some instances still in force. Thus, Commonwealth extradition *inter se* is generally regulated by the Fugitive Offenders Act, 1881[2] and is not governed by the law of nations. However, extradition between Commonwealth members and foreign states is effected under treaty arrangements in accordance with established rules of international law.

This study does not examine in detail Commonwealth extradition practice under international law. Nor does it undertake to treat the domestic problem of intrastate rendition within Commonwealth countries under a federal form of government. It is intended to consider those aspects of extradition which are peculiar to the Commonwealth due to the unique constitutional position and international status of its members. Considerably more time will thus be devoted to extradition *inter se*[3] than to extradition between Commonwealth nations and foreign countries.

Extradition under International Law

The provisions of British treaties as a whole reflect the gradual emergence of the colonies from colonial status to that of independent

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[1] See Chapter III (by Robert R. Wilson) on "The Commonwealth and the Law of Nations" in Nicholas Mansergh, *et al.*, Commonwealth Perspectives, Duke University Press, Durham, N.C., 1958.

[2] 44–45 Vict. c. 69. This was extended to cover Protected States by the Fugitive Offenders Act, 1916, 5–6 Geo. 5. c. 39.

[3] The term "rendition" might be applied to the return of a fugitive from one Commonwealth country to another, but the word "extradition" has been used throughout this paper. See L. C. Green, "Recent Practice in the Law of Extradition," 6 Current Legal Problems (1957) 276.

states of the Commonwealth. Extradition treaties likewise indicate this development, albeit at a much slower pace than in the case of commercial treaties. Great Britain ceased to include self-governing colonies automatically within the reach of commercial treaties, unless the colonies so desired, as early as 1880.[4] A parallel development was not forthcoming in extradition until much later. Prior to World War I the extradition treaties of the United Kingdom were automatically applicable to the self-governing dominions, colonies or possessions.[5] However, since that time it has been customary to provide for separate adherence and determination on the part of such entities by means of notification through the proper diplomatic representative.[6]

The extradition treaties of Great Britain continued to have the same validity in regard to the former components of the Empire after such units attained independent Commonwealth status as they had prior to the acquisition of such independence.[7] The Government of Pakistan was particularly concerned over this matter because of its special problem of state succession in regard to the treaties of India. However, the former extradition treaties of India did devolve on the state of Pakistan.[8] As a matter of fact even Ireland and Burma through succession continue to adhere to extradition treaties of the United Kingdom which were in force prior to their attainment of the status of independent states not members of the Commonwealth.[9]

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[4] See Canada, Sessional Papers, 1883, vol. XVI, no. 89, pp. 7–8 and the Treaty of Commerce and Navigation of 1880 with Roumania, Great Britain, House of Commons, Accounts and Papers, 1881 (C. 2615).

[5] See, for example, the Treaty Between the United Kingdom and Greece for the Mutual Surrender of Fugitive Criminals, signed on September 24, 1910. Accounts and Papers, 1912–1913 (Cd. 6074).

[6] See, for example, the Extradition Treaty of May 30, 1924 between the United Kingdom and Finland. 34 L.N. Treaty Series 80.

[7] For example, in the case of Ex parte O'Dell and Griffen counsel for the applicants contended before the Ontario High Court that ". . . the present relationship between the Crown and this country is completely different from the relationship which existed in 1842 when Canada was only a possession of Her Britannic Majesty in America and that subsequently the Ashburton Treaty, not being a treaty made by Her Britannic Majesty on behalf of Canada as a self-governing and independent nation, no longer has any force and effect." The judge did not find this to be true and said in part, "There is nothing to prevent Canada from entering into a new treaty with the United States or substituting some other extradition arrangement for the one which is now embraced within the terms of the Ashburton Treaty, but until that is done the Treaty remains in force and effect and is binding upon the signatories thereto, including Canada." 3 Dominion Law Reports (1953) 207.

[8] The Pakistan Government on at least one occasion made formal inquiry as to the validity of such an extradition treaty. On January 23, 1952, the Pakistan Embassy in Belgium inquired as to whether the Extradition Treaty of October 29, 1901, between the United Kingdom and Belgium, to which India was a party, was still considered to be binding between the Governments of Belgium and Pakistan. The Belgian Government replied in the affirmative. 133 U.N. Treaty Series 201–202. The United States also takes the view that such Treaties devolved upon Pakistan. See United States, Department of State, Treaties in Force: A List of Treaties and Other International Agreements of the United States, October 31, 1956, Department of State Publication 6427, p. 105.

[9] See, for example, *ibid.* pp. 17, 73. For brief accounts of recent extradition practice in

Actually, Commonwealth nations, although empowered to do so, seldom negotiate their own extradition treaties. This is illustrated by the fact that in 1956 the extradition agreements between the United States and all of the Commonwealth members except the Union of South Africa and Canada were governed entirely by treaties between Great Britain and the United States.[10] The United Kingdom continued to provide for the separate adherence to and termination of United Kingdom treaties on the part of the Commonwealth countries even after the latter became independent states.[11]

However, this is not to say that the extradition practice of the United Kingdom and that of the members of the Empire or Commonwealth were, or now are, identical. The alteration of treaties by separate members of the Commonwealth, treaty interpretation, and variations in the domestic laws of Commonwealth countries, as in the case of double criminality, have all created divergencies in practice. Thus, the government of the United Kingdom might extradite a criminal on grounds for which another Commonwealth country might refuse extradition.

The practice of separate adherence and termination on the part of Commonwealth members to the extradition treaties of Great Britain places such treaties in a position analogous to that of multilateral treaties. The obligations of the "parties" to such treaties may even vary considerably in a manner similar to that of parties to a multilateral convention which have signed such an instrument with reservations. For instance, a Commonwealth country may amend an extradition treaty of Great Britain by means of negotiations with the foreign country concerned without affecting the obligations of the United Kingdom or other members of the Commonwealth under the treaty.[12] Thus,

Ireland see A. G. Donaldson, Some Comparative Aspects of Irish Law (1957) 105–106, 120–122; Andrew Phelan, "The Republic of Ireland and Extradition," 56 The Law Journal (1956) 39.

[10] Treaties in Force, cited above, pp. 22, 129. As might be expected Canada, due to its proximity to the United States, is a party to a number of extradition treaties which are confined in operation to Canada and the United States. See, for example, the Supplementary Convention of May 15, 1922 (U.S. Treaty Series 666) and the Supplementary Convention of October 26, 1951 (U.S. Treaties and Other International Acts 2454).

[11] See, for example, the Supplementary Extradition Treaty of September 28, 1936, between the United Kingdom and Hungary. 181 L. N. Treaty Series 338. However, it is to be noted that no provision is made for the accession of Eire and Burma since they have become independent states, not members of the Commonwealth.

[12] See, for example, the exchange of notes of March 28 and 30, 1938, between the Governments of the Union of South Africa and Estonia amending Article 2 of the Extradition Convention of November 18, 1925, to include the crime of traffic in dangerous drugs. 196 L.N. Treaty Series 413. This was somewhat of a departure in that the exchange of notes affecting South Africa only was carried out by the Political Secretary to the High Commissioner for South Africa in London and the Estonian Minister in London, rather than through His Majesty's diplomatic representative in Estonia, as in accordance with former practice. 142 British and Foreign State Papers (1938) 385–386. It is worthy of note that a Commonwealth Government may be a party to a supplementary convention which amends an original convention even though

although the same treaty of extradition may be in force in regard to several Commonwealth states, all of its provisions may not be applicable in the same manner.

The statutory means of implementing extradition treaties is also not the same in all Commonwealth countries. Extradition treaties are not self-executing in the United Kingdom and are implemented by municipal legislation. Prior to 1870, separate legislation was enacted for each treaty,[13] but with the passage of the Extradition Act (Imperial) of 1870,[14] this practice ceased. Treaties to which the United Kingdom was a party could be made applicable under this Act to a foreign state or a member of the Empire by means of orders-in-council. The same Act also regulated extradition procedure to be followed by the United Kingdom and the parts of the Empire to which the Act had been extended by orders-in-council. This Act is in force throughout the Commonwealth (with the exception of Canada),[15] and in Eire. If a member of the Commonwealth passes its own legislation in respect to extradition, as in the case of Canada, such local legislation may either suspend the Act in relation to that entity or be directed to operate as if it were a part of the Act of 1881. Great Britain still issues orders-in-council concerning Commonwealth accession to or termination of extradition treaties in accordance with the provisions of this Act.[16]

Double criminality has long been one of the requirements for the extradition of a fugitive under the treaties of the United Kingdom.[17]

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the original did not provide for separate accession on the part of self-governing dominions or colonies. For example, see the Supplementary Treaty of January 28, 1937, by which the Governments of Australia, New Zealand, and the United Kingdom amend the Extradition Treaty of November 22, 1880 with Luxembourg. Accounts and Papers, cited above, 1937–1938 (Cmd. 5811).

[13] See, for example, the Mutual Surrender of Criminals (Denmark) Bill of July 18, 1862, which was "An Act for Giving Effect to A Convention between Her Majesty and the King of Denmark for the Mutual Surrender of Criminals." *Ibid.*, 1862 (220) III, 483.

[14] 33–34 Vict. c. 52. This Act has been amended from time to time, principally by the addition of new crimes for which a fugitive may be extraditable, as follows: The Extradition Act, 1873 (36–37 Vict. c. 60); The Extradition Act, 1895 (58–59 Vict. c. 33); The Extradition Act, 1906 (6 Edw. 7. c. 15); The Extradition Act, 1932 (22–23 Geo. 5. c. 39); The Counterfeit Currency (Convention) Act, 1935 (25–26 Geo. 5. c. 25).

[15] Guide to Government Orders Indexing S.R. and O's and S.I.'s. In Force 31st December, 1951, pp. 407–411. Canada has its own Act Respecting the Extradition of Fugitive Criminals, which deals with extradition matters and replaces the Extradition Act, 1870. Revised Statutes of Canada (1952) Vol. 5, c. 32.

[16] By Order-In-Council No. 1171 of 1951 the Extradition Act of 1870 was made applicable with the assent of Australia to the Convention of August 3, 1949 with Luxembourg. Great Britain, Statutory Instruments (1951) No. 1171. In 1953 Australia and New Zealand terminated the Extradition Treaty with Sweden in respect to the same Act by means of Orders-In-Council. *Ibid.*, (1953) Nos. 1220, 1221, respectively.

[17] See, for example, Article I of the treaty of April 15, 1862, with Denmark (Accounts and Papers, cited above, 1862 (3006) LXIII, 277); Article 2 of the treaty of May 30, 1924, with Finland (34 L.N. Treaty Series 80); Article 3 of the treaty of December 22, 1931 with the United States (U.S. Treaty Series 894). For a discussion of double criminality in regard to Canada and the United Kingdom, see Manley O. Hudson, "The Factor Case and Double Criminality in Extradition," 28 A.J.I.L. (1934) 274–306.

The Commonwealth is composed of a number of territories with different local laws. It has, therefore, been faced with problems similar to those experienced by the states of the United States in regard to double criminality. As early as 1862, Great Britain maintained that the law under which criminality should be determined was the law of the locality in which the fugitive was apprehended.[18] The First Schedule of the Extradition Act of 1870 states in part, "The following list of crimes is to be construed according to the law existing in England, or in a British Possession (as the case may be) at the date of the alleged crime. . . ."[19] Criminality is therefore determined on the basis of the local law of the Commonwealth country concerned and is in no way dependent on English criminal law.[20] Although the local law may be a form of "Anglo-Dominion" common law akin to that of England, there may also be some wide divergencies. This is especially true in the case of the Union of South Africa where the substantive criminal law has been influenced by the Roman-Dutch law,[21] or in the case of India where the penal code follows the nationality principle and permits jurisdiction to be exercised over crimes committed by Indian citizens outside of Indian territory.[22] The problem of the local law to be applied in establishing the fact that the offense is a crime in both the extraditing and receiving country may also become complicated in the case of federal governments in which the several states that are members may each have their own criminal law. This does not present a problem in the case of Canada, which has a federal criminal code. However, Australia does not have a federal criminal code except in regard to the Australian Capital Territory. In the case of *In re Gerhard,*

[18] The Mutual Surrender of Criminals (Denmark) Bill of July 18, 1862, cited above, states that where a person is accused such evidence should be produced to the magistrate as "according to the Laws of the Part of Her Majesty's Dominions in which the Magistrate is acting, would in his Opinion justify the Apprehension and Committal for Trial of the Fugitive if the Crime of which he is accused had been there committed. . . ."

[19] Similar provisions have also been made in the extradition treaties negotiated by the United Kingdom. See, for example, the Extradition Treaty of May 30, 1924, with Finland. Article 8 states in part "The requisition for the extradition of an accused person must be accompanied by a warrant of arrest . . . and by such evidence as, according to the laws of the place where he is found, would justify his arrest if the crime or offense had been committed there." Under Article 17 the treaty is applicable "so far as the laws permit." 34 L.N. Treaty Series 80.

[20] For instance in Curry's Case the New Zealand Supreme Court granted a writ of habeas corpus to the applicant. He had been convicted in France of *banqueroute frauduleuse* which was listed as an extraditable crime in the Treaty of May 10, 1878, between France and Great Britain. However, the court called attention to the Extradition Act, 1870 which states that the list of crimes therein "is to be construed according to the law existing in England or in a British Possession (as the case may be). . . ." The court found that the offenses under the generic term *banqueroute frauduleuse* were different in New Zealand than under French law. 6 New Zealand Law Reports (1888) 630.

[21] See G.W.F. Dold and C.P. Jaubert, "The Union of South Africa," vol. 5 of The British Commonwealth: The Development of Its Laws and Constitutions (1955), p. 267.

[22] See Mahomed Khader Nawaz, "Criminal Jurisdiction and International Law," The Indian Year Book of International Affairs (1952) I, 212–213.

counsel for the defense contended that the Police Magistrate, who derived his authority from the state of Victoria, had issued the warrant for extradition under an order made by the Governor-General of the Commonwealth. Justice Holroyd found that the word "Governor" as used in the Extradition Act did not cover the Governor-General of the Commonwealth as the central government had not legislated on the subject of extradition. The justice, therefore, held that the power of the states in regard to extradition had remained intact after federation and Gerhard should be released.[23] A federal act was passed in 1903 whereby the powers of the Extradition Act of 1870 were vested in the Governor-General or any deputy authorized by him. In accordance with the Act of 1903 the Governors of the states were delegated as deputies.[24] An Order-In-Council of March 7, 1904, provided for exercise of the powers of extradition by both the federal and state governments of Australia.[25] Thus the law of any of these governments could be utilized in determining criminality, depending on the part of Australia in which the fugitive was apprehended.

Extradition *Inter Se*

The arrest in one part of the British Empire or Commonwealth of a fugitive from justice in another part of the Empire or Commonwealth and his return is not regulated by extradition treaties or the general rules of the law of nations governing extradition, but by the Fugitive Offenders Act, 1881. The Act was passed with little comment. In presenting the bill to the House of Lords, the Lord Chancellor merely gave a brief statement that it was designed to replace an act of 1843 which only covered treason and felonies. He considered it to be "a useful and necessary measure" which was "intended to provide more effective means for arresting fugitive criminals."[26] Except for the comments of Mr. T. P. O'Connor in the committee report,[27] the drafters of this bill appeared to view it more or less as an administrative matter and did not regard it in the same manner as extradition in the international sense of the word.[28] As a result the Act does not

[23] 27 Victoria Law Reports (1901) 655. For an account of Australian practice under the Extradition Act of 1870 and the Fugitive Offenders Act of 1870 see G. B. Castieau, "The Statutory Basis of Extradition in Australia," 1 Proceedings of the Australian and New Zealand Society of International Law (1935) 122–142.

[24] Australia, Commonwealth Acts (1901–1950) Vol. II, p. 1853.

[25] Australia, Commonwealth Statutory Rules, 1901–1927, IV, 3395. For a similar problem in connection with the Fugitive Offenders Act see pp. 23–24, below.

[26] Hansard's Parliamentary Debates (1880) Third Series, vol. 261, clmns. 1032–1033.

[27] See below at p. 24.

[28] This idea is also reflected by Sir James Stephen in his well known three-volume work, which was published two years after the passage of the Act. He devotes several pages to extradition in the last two sentences of which he notes the passage of the Act and concludes, "It is unnecessary to notice its provisions in detail; they are merely administrative, and involve no principle of interest." Sir James F. Stephen, A History of the Criminal Law of England (1883) II, 74.

provide some of the safeguards which are normally utilized in international law for the protection of the fugitive.

Part I of this Act applies to the return of fugitives in general and does not list specific extradition crimes as is the practice in the extradition treaties of the United Kingdom. It is merely provided that the Act applies to treason, piracy, or "an offense punishable in the part of His Majesty's Dominions in which committed for a term of twelve months or more with hard labour." If a warrant is issued in one part of Her Majesty's Dominions by a judge of a superior court, the Secretary of State of the United Kingdom, or by the Governor of a "possession," a magistrate from any part of Her Majesty's Dominions may issue a provisional warrant for the apprehension of the fugitive if the facts "would in his opinion justify the issue of a warrant if the offence of which the fugitive is accused had been committed within his jurisdiction." The magistrate is to hear the case in the same manner as if the offense had occurred in his jurisdiction. If the evidence "raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which the part of the Act applies" the magistrate shall imprison the fugitive to await his return. The prisoner may be returned after fifteen days have elapsed or if he has applied for a writ of habeas corpus after the court has rendered a decision on such an application. If the prisoner is not returned within one month after committal the court must show cause why he should not be released. If the prisoner is not tried within six months after his return he will on request be returned free of cost to the place where he was apprehended.

Part II of the Act was even more liberal and applied to British possessions which were grouped together because of their contiguity. Under this part of the Act a magistrate on receiving a warrant from a proper authority in an area to which this section applies may merely apprehend the fugitive by endorsing the warrant. If the magistrate is satisfied that the warrant is authentic and that the fugitive is the same person named in the warrant he may extradite him without further proceedings. The magistrate does, however, have the discretion under Section 10 to refuse to return the fugitive if the offense is too trivial, or if the application is not made in good faith, or if he finds that the punishment is unjust, oppressive, or overly severe.

It is to be noted that return of a fugitive under Part I is more analogous to normal extradition procedure under the law of nations than is Part II of the Act. However, the analogy between this Imperial Act and normal extradition procedure between foreign countries is far from being complete. On occasion the courts have noted these differences. One of the main differences lies in the matter of proof of guilt. The courts may expend considerable effort on proof of guilt before a fugitive is returned under Part I of the Act, as is illustrated by the

Canadian case of *R. v. Delisle*. The judge in speaking of the Fugitive Offenders Act said in part:

> "The underlying principle of such legislation is the same which governs in extradition matters. . . . Our Government will not surrender to a foreign state, however friendly, any person . . . without first having ascertained, by the proceedings and findings of the highest Courts of Canada, that such a crime has really been committed by that person. Likewise, Canada will not surrender to any Government of Her Majesty's possessions any criminal fugitive without clear evidence of guilt made and controlled under the authority of the Superior Courts."[29]

However, the courts have as a rule been less particular in this matter than is the case under an extradition treaty. For instance, in the Canadian case of *In Re Harrison* the judge drew attention to the fact that there was a difference between the Extradition Act and the Fugitive Offenders Act. He noted that under the latter the judge has discretion and may if he so desires "accept only the allegation of the complaint as the foundation for issuing a warrant." The judge said further:

> "It is quite obvious that some additional care ought to be taken in the case of extraditing persons to foreign countries than in facilitating criminal proceedings in the various parts of the Empire, to which alone the Fugitive Offenders Act applies."[30]

As can be seen from Part II of the Act, the return of a fugitive offender to a contiguous territory is extremely informal with little concern over proof of guilt.[31] The discretion given to the magistrate under Section 10 to refuse the return of a fugitive, if it appears that the application has not been made in good faith or the punishment will be unjust or overly severe, is rarely exercised.[32]

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[29] 20 Canadian Abridgement (1940) clmn. 136.

[30] 25 British Columbia Reports (1918) 433, 437. See also Ex Parte Lilly White in which Judge Stout, of the New Zealand Supreme Court, in speaking of the difference between the Extradition Act and the Fugitive Offenders Act said, "At common law there was thought to be an asylum for foreign offenders; and it is only by virtue of treaties that foreign offenders are given up. The rendition of an offender against the Crown from one portion of the possessions of the Crown to another portion should, it seems to me, be differently viewed." 19 New Zealand Law Reports (1901) 502, 505.

[31] See Re C. G. Menon and Another, below.

[32] For example in the case of Re Henderson, which came before the Court of Appeal of the United Kingdom in 1949, the counsel for the fugitive claimed that he should not be returned, in accordance with Section 10 of the Act, as he would not be able to defend himself properly since he would not be able to see or hear the prosecution witnesses. The judge said in part, "I think the kind of matters with regard to which this court would act would be where it appears that the contemplated proceedings, although perhaps lawful by the law of the country concerned, are really going to be conducted in a way contrary to natural justice or contrary to our ideas of it." 1 All England Reports (1950) 283. In Rex v. Governor of Brixton Prison, Ex Parte McCheyne (1951) Lord Chief Justice Goddard ordered the discharge, under section 10 of the Act, of a fugitive

It is to be noted that there is no specific list of crimes for which a person may be extradited from one part of the Commonwealth to another. Any offense which is punishable by twelve months hard labor and which the judge does not consider to be too trivial in nature is an extraditable crime. Furthermore, although under international law a person once extradited may generally not be tried for an offense other than the one for which he is extradited,[33] no such provision exists under the Act and a person may be tried for a crime other than the one listed in the warrant for his return.[34]

A special problem arose in Australia after her federation. Prior to this event, the judges and magistrates of the various colonies in Australia exercised jurisdiction under the Fugitive Offenders Act, 1881. However, after federation the supreme courts of Western Australia and Queensland found that Australia was a single entity in regard to the Act of 1881 and that the Act no longer applied to the single states of Australia.[35] In the case of *McKelvey v. Meagher,* counsel for the applicant argued that a judge and magistrate in the state of Victoria had no jurisdiction under the Act as after federation its powers rested with the central government, as was the case in Canada. The court noted that the Dominion Parliament of Canada had jurisdiction over criminal matters whereas there was no general criminal law for the Commonwealth of Australia. It found that "The central legislature referred to in the Fugitive Offenders Act 1881 is a central legislature which has the power to deal with criminal matters." The Court therefore held that the judge and magistrates of Victoria did have jurisdiction.[36]

However, the Supreme Court of New Zealand subsequently held in the case of *Re Munro and Campbell* that a writ of habeas corpus should issue to the prisoners. The crime for which their return to Australia had been requested was found to be a crime committed and punishable by the law of New South Wales, not that of the Commonwealth of Australia, which was a single entity for the purposes of Part II of the Fugitive Offenders Act.[37] The High Court of Australia in the case of *McArthur v. Williams* in referring to *Re Munro and Campbell* said, "We are respectively of the opinion that it does not give the true effect

from South Africa. However, he noted that the jurisdiction to discharge a fugitive in such a case "ought to be seldom and carefully exercised." 211 The Law Times (May 4, 1951) 25.

[33] C. C. Hyde, International Law Chiefly as Interpreted by the United States (2nd. rev. ed.) II 1032–1034; H. Lauterpacht, ed., International Law: A Treatise (8th ed.) 1, 702.

[34] See, for example, R. V. Esser 9 Natal Law Reports (1888) 238, cited in T. G. Duncan, Ed., The Digest of South African Case Law (1927) II, 1107.

[35] In re Willis, 7 Western Australia Law Reports (1905) 249; R. V. Pierson, Ex Parte Small, State Reports (Queensland) [1906] 5.

[36] 4 Commonwealth Law Reports (1906) 265.

[37] New Zealand Law Reports (1935) 59.

of the Australian political system." The High Court found that although Australia was "one British Possession" for purposes of the Act the judicial officers of the several states had authority under the law of that possession and were therefore competent to assume jurisdiction under the provisions of the Act.[38] Shortly thereafter the Court of Appeal of New Zealand also found that a fugitive could be returned to Australia for an offense "against the law obtaining in *any part* of the Commonwealth of Australia."[39]

A number of new members have been added recently to the Commonwealth, some with considerable political differences. This gives rise to the question as to whether the generally accepted principle of international law that a person may not be extradited for a political offense should not also be applicable to the Fugitive Offenders Act. The Act is silent on the matter, but the committee report on this Act is rather revealing. Mr. T. P. O'Connor, Member of Galway, drew attention to the fact that it was not customary to extradite fugitives for political crimes and asked that the word "treason" be dropped from the enumerated offenses. He posed the question "Why should a different practice be introduced in their relations with Colonial Governments to that which obtained in their relations with foreign nations?" The Attorney General declared that ". . . the Government could not possibly agree to this." He noted that

> "as regarded the Mother Country and her Colonies, the authortiy of the Crown extended over the whole. The result of allowing such an amendment would be that a person in this country might pass over to a Colony and yet not be made answerable to a law general to both the Colony and the Mother Country."

Mr. O'Connor was assured that even though the word "treason" were dropped the general wording of the act would still cover such an offense, so the proposed amendment was dropped.[40]

The courts have not refused to return a fugitive for a political offense. However, on at least two occasions fugitives have attempted to avoid return under the Act because of alleged political persecution. In the case of *Re C. G. Menon and Another* the Madras High Court did not treat the question of Menon's allegation that he was a victim of political animosity, as Menon was released for other reasons.[41] However, in the case of *Re Government of India and Mubarak Ali Ahmed,* which was decided by the Queen's Bench Division of the High Court of Justice in 1952, the court spoke to the problem. The applicant attempted to obtain a writ of habeas corpus to prevent his return to

[38] 55 Commonwealth Law Reports (1936) 324.
[39] Goodwin v. Walker, New Zealand Law Reports (1938) 712. Italics inserted.
[40] Hansard, cited above (1881) Third Series, vol. 265, clmns. 597–600.
[41] 54 Criminal Law Journal (India) [1953] 1364.

India for forgery. The counsel for the applicant maintained that he had been persecuted for political reasons by India and was considered to be a spy for Pakistan. Lord Chief Justice Goddard did not find that the applicant would be persecuted as a political offender and ordered his return. However, after citing *Re Castioni* he said in part:

> "I am quite sure that in a proper case the court would apply the same rules with regard to applications under the Fugitive Offenders Act, 1881 as it does under s. 3 (1) of the Extradition Act, 1870. If it appeared that the offence with which the prisoner was charged was in effect a political offence, no doubt this court would refuse to return him."[42]

This dictum certainly can not be justified by the letter of the Act, nor the intent of its framers as evidenced by the Attorney General's statement quoted above. However, it is significant in that it indicates an attempt of the court to adjust the Act to existent realities. The attempt to draw on the law of extradition may also be illustrative of a tendency to lessen the distinction which has traditionally existed between the Extradition Act and the Fugitive Offenders Act by giving the latter an interpretation more in line with the rules of international law.

Although the application of the Fugitive Offenders Act is not questionable in the case of old Commonwealth members, such as Australia, Canada, New Zealand, and South Africa, there appears to be some doubt as to the future of this Act in some of the newer Commonwealth countries.[43] In the case of *Re Government of India and Mubarak Ali Ahmed,* it was held that "the Fugitive Offenders Act, 1881, is in full force and effect between this country and India."[44] The Madras High Court found that the Act was in effect in India in the case of *C. G. Menon and Another,* but found that Part II of the Act could not be enforced by the court as it denied the equal protection of the laws and was repugnant to the Constitution of India. Menon was, therefore, not returned to Malaya. However, the case was appealed to the Supreme Court of India, which found that the Fugitive Offenders Act, 1881, was not in force in respect to India and raised some very serious questions as to India's position in regard to the surrender of fugitives to other Commonwealth countries. In speaking of the Fugitive Offenders Act, 1881, the court said in part:

> "The situation completely changed when India became a Sovereign Democratic Republic. After the achievement of independence

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[42] 1 All England Reports (1952) 1060.

[43] See Guide to Government Orders, as cited above, 31st December, 1951, pp. 411–412 for a listing of Commonwealth countries in which the Act is exercised.

[44] See also Re Henderson, note 32, above, in which a court of the United Kingdom held that the applicant should be returned to India under the Fugitive Offenders Act, 1881.

> . . . by no stretch of the imagination could India be described as a British Possession and it could not be grouped by an Order-In-Council among those possessions. Truly speaking, it became a foreign territory so far as other British Possessions are concerned and the extradition of persons taking asylum in India, having committed offences in British Possessions could only be dealt with by an arrangement between the Sovereign Democratic Republic of India and the British Government and given effect by appropriate legislation. . . . The provisions of that Act could only be made applicable to India by incorporating them with appropriate changes into an Act of the Indian Parliament and by enacting an Indian Fugitive Offenders Act."[45]

However, the Federal Court of Pakistan has held that the Act is in force in that country.[46]

The relation of Eire to the Commonwealth under the Fugitive Offenders Act is unique. Traditionally, the Act has been applied between Ireland and England, Scotland, or Wales. In the case of the latter, the return of fugitives is governed by the reciprocal provisions of the Indictable Offenses Act, 1848, section 12[47] and the Petty Session (Ireland) Act, 1851.[48] In *The King v. Commissioner of Metropolitan Police, Ex parte Nalder,* which came before the King's Bench Division of the High Court of Justice in 1948, the applicant claimed that proceedings ought to have been properly instituted under the Fugitive Offenders Act, 1881. Lord Chief Justice Goddard noted that in the Irish case *The State, at the Prosecution of Michael Kennedy v. Edward J. Little* (1931), the court held that the Fugitive Offenders Act was considered to be in force between Canada and Ireland by the effect of section 73 of the Irish Constitution of 1922. Lord Goddard found, however, that the proceedings had been properly instituted under the Petty Sessions (Ireland) Act, 1851, which was still in force on the basis of the Irish Free State (Consequential Provisions) Act, 1922. He noted, "It is not necessary to express an opinion whether the Act (Fugitive Offenders Act) can apply at all between England and Eire, though the strong inclination of my opinion is that it cannot."[49] Although the validity of the Fugitive Offenders Act does not appear to have been contested by the courts since the 1931 case cited by Lord Goddard, it would appear that the Act is still in effect as it rests on the same constitutional basis as the Petty Sessions (Ireland) Act and

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[45] 17 Supreme Court Journal (India) [1954] 621.

[46] See E. M. Bhaba v. the Crown, 2 All-Pakistan Legal Decisions (1954) Sindh 101.

[47] 11–12 Vict. c. 42.

[48] 14–15 Vict. c. 93.

[49] 1 King's Bench (1948) 251. As late as 1952 the High Court of the Republic of Ireland held that the Petty Sessions Act, 1851 was still in force in Ireland. See Donaldson, *op.cit.*, p. 120, citing The State (Duggan v. Topley) (1952) Irish Reports 62.

an examination of the Irish Statutes does not reveal that Ireland has passed any legislation in regard to the Fugitive Offenders Act which could be taken as a basis for its repeal.[50]

Conclusions

Over three quarters of a century have passed since the passage of the Extradition Act, 1870, and the Fugitive Offenders Act, 1881. The transition from Empire to Commonwealth has changed the circumstances in which these acts were created and the constitutional basis on which they formerly rested. In the case of Ireland and Burma there is no reason why they should not conform to the normal practices of non-Commonwealth members of the family of nations in extradition matters. At any rate these two countries will in all probability be forced to take independent action in regard to extradition procedures with foreign countries since they will not be able to accede to United Kingdom treaties negotiated after they attained the status of independent nations outside of the Commonwealth.

The Fugitive Offenders Act was passed at a time when the supreme legislative powers for the Empire rested in the Parliament of the United Kingdom and the Judicial Committee of the Privy Council was the highest court of appeal. However, at present a goodly portion of the Commonwealth members no longer allow appeals to the Judicial Committee of the Privy Council. The Act offered an easy administrative expedient for the return of fugitives from one part of the Empire to another without their ever leaving the jurisdiction of the highest court of appeal. The rather easy-going rules in regard to proof of guilt under Part I of the Act which permitted a magistrate to imprison a fugitive for return if the evidence "raises a strong or probable presumption" that he is guilty of an offense to which the Act applies, or Part II which merely requires the magistrate to endorse the warrant and establish the fugitive's identity, no longer appear compatible with the independent judicial systems of the states of the Commonwealth.

The fact that these Acts have operated so long and under such

[50] Phelan notes that there is a rather serious gap in the extradition law of Ireland. The Indictable Offenses Act and Petty Sessions Act cover the whole island and are, therefore, not applied between Northern Ireland and Eire. He writes, "At present a thief, for example, who flees across the border is apprehended and returned only by police cooperation in unlawful acts and his inability to make an habeas corpus application in time." Phelan, *loc. cit.*, p. 57. However, the Republic of Ireland is evidently quite content with extradition machinery as it now stands. During the question period in the Dáil Eireann on March 4th 1954, the Minister of Justice was asked if he would consider proposing legislation repealing the statutory law whereby citizens were arrested in the Republic and transferred to Great Britain. The Minister replied in part: "I think we should be very slow to upset an arrangement which has stood the test of time and has given so little cause for complaint over so long a period." Dáil Eireann, Parliamentary Debates (4 March 1954) vol. 144, clmn. 1285.

changed circumstances is a credit to the lawmakers who originated them, for they were wise enough to permit a rather high degree of local latitude. However, these Acts are now in need of revision. It might be rather difficult to reach agreement on revisions. Perhaps this could best be accomplished by the simultaneous adoption of new legislation in each of the Commonwealth entities dealing with the subject. However, this method did not prove too satisfactory when it was adopted in regard to nationality law. The problem could also be solved by the negotiation of a multilateral convention on extradition to which the Commonwealth countries, or even non-Commonwealth nations such as Burma and Eire, could become a party. If the development continues in the direction it is now going it may break down in regard to other members of the Commonwealth, as it appears to have done in the case of India. This may well be an area in which Commonwealth countries will choose to abandon the Commonwealth law in favor of the law of nations.

HARROP A. FREEMAN

An Introduction to Hindu Jurisprudence

This article intends to be introductory to other more specific studies and, to that end, briefly surveys Hindu jurisprudential theory. It seeks an orientation, recalls the development of Hindu legal institutions, and examines "schools" of jurisprudence in ancient India. It turns to an analysis of ancient Hindu thought on common jurisprudential issues (the state, law and the rule of law, punishment and procedure) and finally attempts to reveal something of modern Hindu jurisprudence's growth, richness, and diversity and its similarity to our own.

(1) *An Orientation.* The practice has become prevalent in American academic writing to set off East and West as opposites. It is said that the West places its reliance on reason and the scientific method; the East, on supersensory experience and intuition.[1] This tends to emphasize, to borrow F. S. C. Northrop's phrase, "ideological differences."[2] Even if a writer concludes that natural law is at the foundation of both Eastern and Western legal orders he still treats them as different—one "known by immediate apprehension," and the other "known postulationally."[3] This leads to the conclusion that attempts to combine Oriental and Occidental economic, political, aesthetic, and religious values end in failure.[4]

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[1] C. Watts Cunningham, "How Far to the Land of Yoga? An Experiment in Understanding," 57 The Philosophical Review (1948) 513; P. T. Raju contrasts the "inwardness" of Indian philosophy with the "outwardness" of "Western" philosophy, "The Western and Indian Philosophical Traditions," 56 The Philosophical Review (1947) 127; John C. Archer, Faiths Men Live By (New York, 1943).

[2] F. S. C. Northrop, The Meeting of the East and West (1946) and Ideological Differences and World Order (New Haven, 1949). Thus, Professor Northrop once attempted to explain the attitudes of America and India on Korea on the basis that American law, derived from the Christian concept of an all good God against an all evil devil or right opposed to wrong, required a determination of "wrong" or "aggression" and "punishment." On the other hand, India, which recognized no God vs. Devil theology, emphasized compromise and settlement without determination of right and wrong. ("Asian Mentality and United States Foreign Policy," 276 Annals 118, 1951). In my work in India with lawyers, law schools, and courts, I found law as litigious as in America. The ratio of litigation to settlement was greater than in my own practice; the proportionate cost of litigation was higher; the minuteness of legal detail at issue was greater; the insistence on vindication of legal "rights" was comparable. In fact, I felt completely at home with the bench and bar of India and South Asia generally.

[3] Gray L. Dorsey, "Two Objective Bases for a World-Wide Legal Order" in Ideological Differences and World Order (New Haven, 1949); Jean Escarra, "Law, Chinese," in Encyclopedia of the Social Sciences and Le Droit Chinois (Paris, 1936).

[4] See, for example, Commencement Address of F. S. C. Northrop, "Understanding the Contemporary World," Univ. of Hawaii, July 1949; *id.*, "Obstacles to a World Legal Order and Their Removal," 19 Brooklyn L. Rev. (1952) 1; *id.*, The Taming of the Nations (1952). Of course, this posits the issue whether Socialist and Marxist legal

The more I study, the more I find no sharp dichotomy between Eastern and Western basic legal theory. Eastern thought is no more supersensory or less reasoning than Western thought. In law, as in religion and matters philosophical, the reply of Dr. Nitobe to Kipling's famous "The East is the East and the West is the West," is more accurate:

> "The East is in the West and the West is in the East;
> There are no points of compass in the human soul."[5]

Elsewhere it has been suggested that world jurisprudence might properly ground itself on basic elements common to all great religions and cultures.[6] This still allows for differences in specific laws just as there are differences within the Anglo-American system, for example, as to the rule against perpetuities.[7]

(2) *Early Development of Legal Institutions.* In this paper, Indian legal thought is briefly considered to show that much the same jurisprudential development, schools of jurisprudence, and theories of law occur as in our traditional Western pattern.

Sir Henry Maine in *Ancient Law* made comparison after comparison between the development of Hindu legal institutions and the development of legal systems of Europe. In fact, he was able to point out from his study certain characteristics of primitive legal systems and certain fundamental stages in their early growth: the prevalence of co-ownership and the intermixture of personal and proprietary rights; the confusion of public and private duties; the importance of the family; the

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theory is a part of the "East" or "West", and where China and India fit into the classification. These writers have tended to rule the communist world out of their systems and to seek a world law for half-a-world. Northrop, "Naturalistic and Cultural Foundations for a More Effective International Law," Yale L. J. 1430.

[5] T. M. P. Mahadevan, "Indian Philosophy and the West," 22 The Philosophical Quarterly, No. 3, 137; E. A. Burtt, "Intuition in Eastern and Western Philosophy," 2 Philosophy East and West, No. 4, January, 1953; George P. Conger, Toward the Unification of the Faiths (Calcutta, 1957) 116; Max Muller, Vedas, p. 4; Vincent Sheean, Lead Kindly Light (New York, 1949) 287; Report, East-West Philosophers' Conference (1948), 115; U. S. Ghoshal, Hindu Political Theories (1927) 7; Manu 2.224 (William Jones translation).

[6] "The United Nations Organization and International Law," 31 Corn. L. Q. 259.

[7] I would be the first to admit the value of the taking of differences. The whole technique of the lawyer is based on recognizing differences—millions of them. What I hope we avoid in comparative law is the mistake comparative religion made, and has not yet rectified, of emphasizing differences to prove that one's own system was *summa cum*. Thus Western religion emphasized its belief in a Supreme Being compared to a pervading presence revealed in many avataras, a man centered compared to a cosmic universe, condemnation of idolatry compared to image worship, original sin and salvation compared to Karma, immortality compared to reincarnation, a religion of material well being compared to asceticism. I venture to suggest that actually all religions have had (and have) in them each of the elements mentioned and that comparative religion is only now discovering its oneness. See note 5 *supra* and E. A. Burtt, Man Seeks the Divine (New York, 1957).

continuous tutelage of women; the growth of the law through fiction.[8] His historical jurisprudence is grounded in Hinduism.

In the early development stages of all legal systems there is no clear distinction between legal rules and religious commands. The story of the Hindu Code of Manu and Moses' Ten Commandments is strikingly similar.[9] Manu's life is a combination of Noah, Jonah, and Moses. The avowed assumption of the old textbooks of Hindu law is that the law is eternal. The primary source of the law is the scriptures—the Vedas.[10] In keeping with the religious view of law, the second source of law is the teaching of the religious leaders and, after that, conscience.[11] There was no clear distinction between legal duties and moral duties. Law embraced all of life and was synonymous with virtue. The Hindu word for law—"dharma"—shows this derivation.[12]

The same relationship can be illustrated by the development of legal literature. The oldest sources of Hindu law are the Vedic hymns based on social custom and divine inspiration. The Aranyakas and Upanishads contain some law, but mainly philosophy and ritual. The Sravta and Grihya Sutras come next and do spell out Aryan custom and rules relating to the social organization. The final stage in the evolution toward ancient Hindu law is the Dharmasūtras, which come near to being lawyer's law. They prescribe detailed rules governing all four stages of life, though chiefly that of Garhasthya or householder. The Dharma Sastras, or Legal Institutes of the Hindus, actually cover civil and criminal law (in Vyavahára), but also social and religious observances (in Achára) and expiation for sin (in Práyaschitta). Smritis, of which eighteen are known, provided numerous commentaries on the Sastras—widely varied by geography, tradition, and culture (somewhat comparable to the glossators on the Roman Code). A practice (e.g., marriage with a maternal uncle's daughter) might be common practice in South India and condemned in the North, and both glossators would find support in the Sastras. In fact, writers from the earliest times up to and including the present debate on the Hindu Code Bill have always sought support of the Sastric norms to justify and approve, or to oppose and challenge practices or proposals of the society in which

[8] Sir Henry Maine, Ancient Law (Everyman ed.) 156; "The ancient German law, like Hindu jurisprudence, makes the male children co-proprietors with their father, and the endowment of the family cannot be parted with except by the consent of all its members," p. 116; widow frequently becomes ward of sons, p. 90; adoption used to expand family into community, p. 16 and ch. 5.

[9] Manu 10.63.

[10] Manu 2.1.

[11] Manu 12.108; Manova-dharma-sastra, VII, v. 6; N. S. Sen-Gupta, Sources of Law and Society in Ancient India (Calcutta, 1914); Morley's Digest of Indian Cases, vol. I, cxcvii.

[12] A. S. Nataraja Ayyer, "Dharma Protects Him Who Maintains It," 4 Vyavahara Nirnaya (1955) 65; "What holds together," "the basis of all order," "the right way," are translations of Dharma.

they live. One of the real strengths of Hindu law has been its reliance on ancient law (religion) while changing it to meet social demands.[13] I shall leave further illustrations of ancient Hindu law and its transition to sections (4) and (5) of this article.

(3) *"Schools of Jurisprudence" in Ancient India.* If you recall that in Anglo-American jurisprudence the earliest legal writings did not differentiate schools and that our scholastic jurisprudence took shape only in the nineteenth century and became recognizable as "schools" in the prolific writing of Dean Pound in the twentieth, and that the chief exponents of some of our schools appeared only within the last forty years (realist, pure theory), you will understand my conclusion that there were no "schools" of jurisprudence in ancient India. Many writers on Indian legal theory have pointed out that the ancient writers would have been surprised to be told that they belonged to a particular "school,"[14]—just as, I suppose, Cicero did not know he was a "natural law" man. Yet these same writers have illustrated the degree to which one can find, in the earliest Hindu writings, matter which presents the natural law, historical, philosophic, analytical (and every other) school of legal thought.[15] But, we ought not to labor a point which should be fairly obvious. Perhaps a quotation from one of India's great modern legal scholars will suffice.[16]

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[13] This note can do little more than refer to a few of the source materials for the above paragraph: Sen-Gupta, Evolution of Ancient Indian Law (London and Calcutta, 1953); McNaughton, Hindu and Mohammedan Law (9th ed., 1885); Seymour Vesey-Fitzgerald, "Law, Hindu" in 9 Encyc. of Soc. Sci.; V. P. Kané, The Dharma Sastras, (Bombay, 1935).

[14] Dr. Burnell (a Sanskrit scholar and lawyer) in his translation of the Varadraja observed, "Another principle deduced by English lawyers is the doctrine of the Schools of Law. This is unnecessary and foreign to the original texts and digests." J. C. Ghose, The Principles of Hindu Law (Calcutta, 1917) 15 agrees. This is also clear from N. C. Sen-Gupta's first Tagore Lecture, 1950, Evolution of Ancient Hindu Law, Introductory (Calcutta, 1953).

[15] N. C. Sen-Gupta in "Sources of Law and Society in Ancient India" (Calcutta, 1914) and Evolution of Ancient Indian Law (Calcutta, 1953) points out much the same factors. Taking random sentences from the introductory chapter of the latter book we find him referring to "the social background of the law" (p. 2 ff.); "positive law grows and ultimately develops into an elaborate code" (p. 3); "Law existed then not as rules administered by kings but as rules developed in fact by custom and usage . . ." (p. 3); "Transgression of these rules (anrita) is not a mere violation of human laws . . ." (p. 3); "the development of law . . . was conditioned by historical events and by the pressure of environments and circumstances, amongst which were the changing needs of society" (p. 18), etc. See notes 8–11 *supra* on historical jurisprudence.

[16] Sri C. P. Ramaswami Aiyar recognizes all these jurisprudential concepts in ancient Hindu law:

> "The importance of 'natural law' and of conscience is recognized by way of guidance in matters of doubt where the Vedas, usage and custom and divine commands do not furnish any help. . . . Dharma is obeyed as such because of the coercive might of the State and the Dharma Sastras of India (the legal text books) like those of Manu, Vaynavalkya, Narada, Brihaspathi and others acquire the validity of statutes on the recognition of their authenticity and authority by the State.

(4) *Ancient Hindu Thought on Typical Jurisprudential Issues.* This section takes several issues with which jurisprudence has always concerned itself to show the degree to which, in approaching these, Hindu thought has evidenced the same theories as has the West, namely (a) the nature of the State and the ruler, (b) punishment and procedure, and (c) the nature of law and the "rule of law."

(a) *Hindu Theories of King and State.* One of the earliest issues to which Hindu jurisprudence addressed itself was the position of the King and State. Originally the king had no divine attributes. From Manu onward he was supposed to rule by divine right.[17] The king was first considered as a judge, taking over the administration of justice from the Kulas and gilds.[18] Vedic theory did not view the king as either the source or repository of the law. He was under and subject to the law and, failing to maintain it, was destroyed by the law.[19] Frequently referred to as checks on the king were religion, custom, pragmatism, natural justice.[20] The right to overthrow a bad king came to be recognized.[21] This view broadened into a true Hobbesian "contract" theory. One of the earliest statements of the political theory that the state of nature was one of might and war and that the state and

> "In Europe, law has been regarded sometimes as the embodiment of eternal justice and as part of the natural heritage of man and embodying natural reason. Another school of thought is that law is that which is brought into existence by the fiat of a law-maker. In other words, that law is obeyed not merely because it is just or good but because it has been laid down by the State. In this way arises the distinction between positive law and ethics. The ethical conception of law was the first to be expounded by Indian law-givers and philosophers. . . . Later on, theories were supplemented by the concept of positive law and there is a long catena of Indian law-givers, including Narada, Sukra and Jaimini who hold that the performance of duty for its own sake having fallen into disuse in the course of human history positive law (vyavahara) was introduced and the King became the superintendent of the law, the wielder of the power to punish (dendadhara). Kautilya lays down that dharma or law is Regnam Agnya—the command of the Ruler."
>
> "The Philosophical Basis of Indian Legal and Social Systems," East-West Philosopher's Conference, 1949, p. 9.

[17] Rigveda IV, 42; Puranic Story of King Vena; Manu 7. 3–13; Majumdar, Chandhuri and Datta, Advanced History of India (London, 1950) 120 ff. Brihatparasara and Ramayana ii, 67 quoted in Ghoshal, note 5, *supra,* at 121, 185.

[18] N. C. Sen-Gupta, Evolution of Ancient Indian Law, 39 and authorities cited.

[19] Manu 8. 15; Sukra, i. 121, quoted in Ghoshal, p. 217; Sen-Gupta, pp. 39–41; Rangaswami Aiyanger, Rajdharma, p. 43.

[20] The most quoted religious aphorism is "Dharma is the king of kings" (Brihadaranyaka Upanishad). Beni Prasad, The State in Ancient India (Allahabad, 1928) 506 demonstrates how both religion and custom controlled the king from the time of the Vedic Hymns. Many of the early apologists for kingship, e.g., Kautalya, emphasized the right of subjects to revolt, their disaffection to the enemy and like pragmatic considerations why the king should act properly, Prasad, 507; Manu 12.108; A. S. Nataraja Ayyar, Dharma Protects Him Who Maintains It, 4 Vyavahara Nirnaya (1955) 65, 83; Sen-Gupta, Sources of Law and Society in Ancient India (Calcutta, 1914) 64–78.

[21] Prachetasa Manu, Ghoshal, p. 138; Mahabharata and Santiparvan, Anusasana 61.32–3, Ghoshal, p. 142; Ghoshal, ch. 4 generally.

ruler were created to destroy anarchy is known as the doctrine of the fishes (Matsya Nyaya) or the two destructive demons (Sundopa) that in nature the larger devour the smaller. The people "assembled together and made compacts (samayal) mutually undertaking to expel from their midst persons guilty of abuse, assault, and connection with other men's wives, as well as those who should break the compact. Afterward they collectively (sahitah) approached the God Brahma . . . (and) the God appointed Manu to rule over them."[22] An examination of the early theorists will show further reliance on contract and utilitarian theory. Thus, the taxes which the king is permitted to collect are said to be his wages for a return agreement to protect the subject.[23]

Although the Mahabarata considers absolute monarchy as the sole Vedic theory of government, writers have demonstrated that the monarchy was limited and that every other form of government existed in ancient India. The king did not rule alone but with a highly organized Sabha, as Sen-Gupta thoroughly documents.[24] Beni Prasad concludes that Indian polity "was saturated through and through with the principles of what for convenience may be called federalism and feudalism."[25] K. P. Jayaswal in his classic *Hindu Polity* discusses the republican forms of government in ancient India. The dedication of the book is interesting: "To the memory of the republican Vrishnis, Kathas, Vaisalas, and Sakyas, who announced philosophies of freedom from devas, death, cruelty, and caste."[26] Some of the forms of government which he finds discussed in ancient Hindu literature are: the *Bhaujya* or cabinet form, membership in which was elected not hereditary;[27] *Pettanika,* similar to the *Bhaujya* form but with hereditary leadership;[28] presidential form (Svarajya) in Northern and Western India, the *Taittiriya Brahmana* describing the president as "the leader of equals";[29] the *Viruddha-rajjani* in which the state is ruled by parties;[30] the *Arajaka*

[22] Sataptha Brahmana, xii.6.24; Ghoshal, p. 127; Santi Parva, chs. 67–68; Ramayana ii.67; K. M. Panikar, Indian Doctrines of Politics (Calcutta, 1940) 4 ff. This is prominent in the Mahabharata.

[23] Bandhayara, i.10.18.1, Govindaswamin comment (Ghoshal, p. 40); Manu 8.144 (Ghoshal, p. 40); Santi., 71.10 (Ghoshal, p. 137); Aparka commenting on Yaj. i.366 (Ghoshal, p. 194).

[24] Sen-Gupta, *supra,* 41–47.

[25] Beni Prasad, The State in Ancient India (Allahabad, 1928) ix, 504, 580ff. See also K. P. Jayaswal, Hindu Polity (2d ed., Pangalore, 1943) 36–39; Edward A. Freeman, History of Federal Government (London, 1863) xl, 721; D. G. Karve, Federations (London, 1932) 24–26; Ramesh Chandra Majumdar, Corporate Life in Ancient India (Poona, 1922) xi, 414; Radhakumud Mookerji, Local Government in Ancient India (London 1920) xxv, 338; Sir Henry Sumner Maine, Village Communities in the East and West (New York, 1889) xii, 413.

[26] Jayaswal, Hindu Polity, note 62.

[27] *Id.,* 79.

[28] *Id.,* 85.

[29] *Id.,* 80.

[30] *Id.,* 88.

or extreme democracy, where the law was ruler and there should be no man-ruler;[31] the Buddhist assemblies, practicing a form of parliamentary government.[32] A government in which the whole population took the consecration of rulership apparently did exist in Nepal—the *Vairajya* or "kingless constitution."[33] Perhaps there is no better way to point up the continuity of this past with the present than to mention the Village Panchayats, often referred to as "village republics." These were the most ancient indigenous village organizations in India. They placed on chosen wise men of each village extensive civil, criminal, and administrative jurisdiction in small matters. They functioned largely in an arbitral manner and seemed to have handled 75–80% of all disputes and government. They combined executive, legislative, judicial, and "administrative" functions, operated without fixed rules of law, and applied a form of local equity or custom. They have continued even under the British, are reconstituted by Article 40 of the Constitution, and are presently efficient in most villages as shown by recent studies.[34] This diversity and yet continuity of past and present seems similar to that in our own tradition, and leads me to deny that the jurisprudence of any country or region has grown so unitary that it is essentially at variance with theories employed in other regions. Our own Graeco-Judeo-Christian jurisprudence contained enough variety to produce Stoic-Republicanism, Hegelian-Nazism, Marxian-Communism, Hobbesian-Monarchism, and at one time even Jeffersonian-Democracy.

(b) *Punishment and Procedure.* There are those who distinguish primitive from civilized law by the degree to which the system embodies well-organized patterns of punishment and procedure. Without accepting this test of civilization, it is to be pointed out that on both scores the earliest Hindu society had a highly organized system. As early as Manu, there is extensive jurisprudential discussion of the king's relation to punishment, judgment on him who uses punishment unjustly, an organized police force, a detailed catalogue of punishments under four titles (admonition, reproof, fine, corporeal) and rules for the use of each.[35]

In our own jurisprudence, we have done much to demonstrate that

[31] *Id.*, 86.

[32] Marquis of Zetland quoted by Professor Rawlinson in The Legacy of India (London, 1937) xi.

[33] Jayaswal, *supra,* 81.

[34] India (Government Reference Annual) (Delhi, 1955) 84 ff; D. Thorner, Panchayats, Indian Yearbook, 1953;

Statistics for Uttar Pradesh up to March 1954 show 13,000 cases handled by Panchayat adalats (courts), revision asked for in 3% of the cases and granted in 1%.

[35] Manu, 8.129, 8.130, 7.14–15, 7.20–22. E.g., "If the king were not without indolence to punish the guilty, the stronger would roast the weaker like fish on a spit."

"The whole race of men is kept in order by punishment; for a guiltless man is hard to find; through fear of punishment this universe is able to enjoy its blessings."

a "right" is a protected interest, that procedure is at the very heart of substance, and that the more highly developed the procedure the more complete is the jurisprudential system. In India, so complete are the records, we can almost place the exact time at which a thorough procedural system comes into being. Apasthamba, Gautama, Vasistha, and Visnu contain few procedural rules (though they develop some rules of evidence); they are still speaking of ordeals and compurgation, (there is slight reference to witnesses).[36] Manu developed an extensive code of evidence but otherwise little procedure.[37] With Jajnavalkya and Narada, the law of procedure becomes complete. Thus in Yajnavalkya we find procedure classified under Plaint, Answer, Proof and Decision.[38] The detail of rules can be seen from the following:

(1) No recrimination or counterclaim is allowed until the complaint is discharged;

(2) No departure from pleading is permissible.

(3) Counterclaim or recrimination is permitted in certain criminal charges.

(4) Each party is required to find a surety for satisfaction of judgment.

(5) Where a contesting defendant loses, he pays an amount equal to the claim to the king; while, where the complaint is found to be false the complainant pays double the amount to the king.

(6) Distinction between cases which have to be tried immediately and those where decision is to be adjourned.

(7) Order of examination of witnesses, plaintiff's witnesses first examined.[39]

Fraud nullifies litigation; the parties are held to their pleadings; sureties may be required; lack of capacity of children and others is known; subpoena, injunction, dismissal on motion, fatally splitting or joining causes of action are all provided for; rules fix parties, classes of complaints, available defenses.[40] The list could be greatly expanded. Perhaps we can make the modern Anglo-American lawyer feel completely at home by the four classes of answers: (a) Admit (Satya), (b) Deny (Mithya), (c) Confession and avoidance (Pratyavasakandana) and (d) *Res judicata* or previous decision (Pranguyaya).[41]

[36] Gautama, Dh. S. XI, 23–25; XIII, 1–6; Apastamba, Dh. S. II 5–7, 11, 29; Manu 8. 1–10; Rigveda VII, 14–15, 105; Vasistha (May. ed. Mandlik, 9). Note the 5 classes of ordeal (Divya): fire (agui), emersion (Apah), balance (Tula), poison (Visa), and drinking (Kosa).

See Gautama Dh. S. XIII, 43 (2 Sacred Books of East, p. 246).

[37] Manu 8.24–26, 46–47, 50–57.

[38] Sen-Gupta, Evolution of Ancient Indian Law, 50.

[39] Vajnavalkya, II, 6–11; Sen-Gupta, 50.

[40] Narada (Jolly Intro., II, 24); Yajnavalkya II, 9–10, 19, 31–32, Mitaksara, Yaju II, 5–6; Kané, Katyayanasmriti, 15–16, 142.

Sen-Gupta, 50–58 and authorities cited.

[41] Narada II, 5–6, I, 62.

Evidence is particularly well and early developed. As early as Gautama, the rules are detailed.[42] From Visnu on, we find classification into real evidence, witnesses, and presumptions. The rules refer to best and secondary evidence, qualification of witnesses, order of proof, cross-examination, burden of proof, *res ipsa loquitur,* hearsay, perjury, demeanor.[43] The point need not be labored further.

(c) *Meaning of "Law"; the "Rule of Law."* In Indian literature, one can find all the conflicting meanings of law which the West has formulated: *lex* and *jus;* justice, legislation, right, duty; natural, divine, enacted.[44] Although we shall turn our attention in a later section to the continuity of modern Hindu jurisprudence with the past, perhaps we can here illustrate these views of law by the opinions of the five India Supreme Court Justices in the famous case of *Gopalan v. Madras,* 1950 S.C.R. 88. Three judges, speaking through Justice C. J. Kania, expressed their view that "law" as used in the phrase "procedure established by law" in Art. 21 of the Constitution meant *"lex"*—laws passed by the legislatures, not *"jus"*—law in the general sense of the principles of natural justice or natural law:

> "To read the word 'law' as meaning rules of natural justice will lead one into difficulties because the rules of natural justice as regards procedure are nowhere defined."

Justice Sastri said that while the word "law" did not mean *jus naturale* it was not limited to law as passed by the legislature but included "settled usages" and "normal modes of proceeding." Justice Fazal Ali held that "law" did mean principles of natural justice.

What has already been said illustrates the extent to which the rule of law obtained in ancient India.[45] This point on "rule of law" may be

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[42] Gautama XIII (Sacred Books of East, II p. 246).

[43] See authorities collected in Sen-Gupta, pp. 66–77. Also Manu 8. 24–26, 46–47, 50–57; Vajnavalkya 6–7, 13–15, 17, 23 (Gharpure's ed. Mitakshara); Narada I 63–64.

[44] Manu 8. 15; Rangaswami Aiyanger, Rajdharma, 43; P. V. Kané, Hindu Customs and Modern Law (Bombay, 1950); N. C. Sen-Gupta, Evolution of Ancient Indian Law, 39 ff; A. S. Nataraja Ayyer, Dharma Protects Him Who Maintains It, 4 Vyavahara Nirnaya (1955) 65; "The Hindu Conception of Law," 17 Bombay L. J. (1939) 41.

[45] I may summarize this ancient and continuing Hindu experience and why some see in India the future hope for the rule of law by reference to the paper of my former student, Professor Chandra P. Gupta, University of New Dehli, *"The History and Present Status of the Rule of Law in India"* presented at the Fourth International Conference of Comparative Law, Chicago, 1957:

> "Through the centuries, the one supreme guiding principle of the Hindu system was that the conduct of the authority, as of the subject, must conform to law or 'Dharma.' 'Dharma,' a word difficult to translate into English, includes the concepts of justice, law, right and duty, and acting according to Dharma means the duty of acting in a way, in the sphere of one's activity, that would best lead the individual to his self-realization—Moksha or Nirwana." . . .
>
> "In shaping the development of the rule of law in our system, the traditions of the English system, acquired during the British rule, the influence of the American Constitutional system, with its 'due process,' our own ancient traditions and the

concluded by reference to two positions of the Indian courts and parliament in the critical years, 1950–53. First, although the Supreme Court refused to accept natural justice as a definition of "law,"[46] it has set aside a decision of a labor tribunal, which failed to allow the parties to produce evidence, as contrary to the rule of law;[47] it issued certiorari to determine whether a tribunal acted contrary to[48] and in other cases followed the established principles of natural justice.[49] Second, the courts in 1950–51 held certain provisions of the land reform acts, adopted under constitutional authority, invalid as not providing proper compensation.[50] Although there was wide criticism in India of the decisions, which held up the much needed land reform program, and many lawyers and political figures believed the decisions thwarted the purposes of the constitution, the country showed its respect for the rule of law and the independence of the judiciary by amending the constitution to remove any ambiguity which the Court had found in the original constitution.[51]

(5) *Modern Hindu Jurisprudence; The Great Synthesis.* We have already objected to the tendency to refer to Asian jurisprudence as though we were discussing the year 500 B.C., which assumes that if Confucius says "X" or the Dharma Sastras contain "Y" or Buddhism teaches "Z," then these must characterize the legal philosophies of modern countries. We have even attempted to show that, properly understood, ancient Hindu jurisprudence is not "ideologically different" from our own. But, it is insisted that, important as antecedents may be, nothing could be wider of the truth than that we should ground

economic and social conditions in the country, have all played an important role. . . .

"In an ideal sense, rule of law implies a social order in which the individual can best attain his self-realization. . . . So long as there is poverty and ignorance, hunger and disease, and so long as there is crime and coercion, force and violence and the denial of basic freedoms, the rule of law is not fully established. Rule of Law is an ideal to be constantly struggled for. In its pure form, it can only exist in a society based on truth and non-violence." See also Judge Ram Keshar Ranade, Pres. Address, Judicial Conference, Godhra, 45 A.I.R. Jour. 37:

"It may sound platitudinous but it is absolutely true that the success of democracy in our country pivots substantially, if not wholly, on the success of the rule of law.' " Nehru, "The Tragic Paradox of Our Age," N.Y. Times Mag., Sept. 7, 1958, p. 13.

[46] Gopalan v. Madras, 1950 S.C.R. 88.

[47] Bharat Bank v. Employees of Bharat Bank, 1950 S.C.R. 459,500.

[48] Veerappa Pillai v. Raman & Co. Ltd. (1952) S.C.A. 287.

[49] Parry & Co. v. Commercial Employees (1952) S.C.A. 299; J. L. Kapur, "Concept of Natural Justice," 6 Indian L. Rev. (1952) 27; Justice William O. Douglas, We the Judges (1957) 28.

[50] State of Bihar v. Kameshwar, A.I.R. 1952 (S.C.) 252.

[51] Constitution (First Amendment) Act, 1951; Constitution (Fourth Amendment) Act, 1955; State of West Bengal v. Subodh Gopal, 1954 S.C.R. 587; Dwarkadas v. Sholapu Spinning and Weaving Company, 1954 S.C.R. 674; State of West Bengal v. Bela Banerjee, 1954 S.C.R. 41; Saghir Ahmad v. State, 1954, S.C.R. 1218. The Indian Law Reviews during the period 1950–1955 contain over one hundred articles on this.

our discussion solely in ancient history. We are concerned with modern law, and modern law is the product of growth and synthesis. Nowhere is this more true than in India.

So much has been written of the English influence on Indian law that it is necessary to do little more than recall its major outline. In the footnotes there is somewhat more extensive consideration of certain fields of law on which American articles are not likely to appear for some time. With British rule in India, English public law, criminal law, law of torts, and procedure were imported wholesale.[52] English influence extended even into Hindu law of family, property, and inheritance, though the Acts declared that Hindu or Mohammedan law was to be applied in these areas.[53] The law of wills is chiefly a British

[52] See generally, S. V. Gupta, Hindu Law in British India (Bombay, 1947).

Law of Torts: Any collection of Indian cases or statutes will show that English cases and concepts are being applied, e.g. defense of act of State (Secretary of State for India v. Kamachee Boyce Sohiba, 7 M.I.A. 476 (1859)) or of judicial act (Judicial officer's Protection Act, 1850) or of quasi-parental authority of teacher (Sankunni v. Swaminatha Paltar, 45 Mad. 548 (1922)) or necessity (Greyvensteyn v. Hattingh, [1911] A.C. 355). Also whether a tort survives death (Legal Representatives Suit Act, XII of 1855; Indian Succession Act, XXXIX of 1925). Or liability for acts of an independent contractor (Dhondita v. Municipal Comm. of Bombay (1892) 17 Bomb. 307); but if the English doctrine, e.g. common employment, is not clear Indian courts may not be bound to follow it (Sect of State v. Rukhamini Bai (1938) Nag. 54). We could go through the law of torts and see that down to the smallest detail the law is essentially English law—nuisance, Rylands v. Fletcher, negligence, lateral support, libel and slander, forms of action, vicarious liability.

Law of Crimes: The basic acts are the Indian Penal Code of 1860 and Code of Criminal Procedure of 1861. The law as it has been carried over today is well and briefly surveyed in A. Gledhill, The British Commonwealth, vol. 6, India, ch. 12, pp. 173–187. Again, an examination of cases shows the complete similarity:

Moti Lal Mallik v. Emperor, 39 C.W.N. 199—where no murder intent but intent to commit felony.

Emperor v. Kastya Rama, 8 Bom. H. C. 63—territorial limits of criminal jurisdiction.

Emperor v. Gopalia, 26 Bom. L. R. 138—mistake as defense.

Emperor v. Kursin-Bux, 3 W.R. 12 and Gokool Bowree, 5 W.R. 33—amount of force useable as defense.

Emperor v. Sathe, 1 Bom. L. R. 351, and Mokit Pandey, 3 N.W.P. 316—abetment.

Emperor v. Bal Gangadhar Tilak (1908) 10 Bom. L. R. 848—sedition.

Emperor v. Chaube Diukar Rao (1933) 55 All. 654—bribery.

Emperor v. Venkatrao (1922) 24 Bom. L. R. 386—contempt of court.

Emperor v. Govinda (1876) 1. Bom. 344—distinction between culpable homicide and murder.

Emperor v. Nemai Chattraj, 27 Cal. 1041—kidnapping.

Emperor v. KaleeModock, 18 W.R. (Cr) 61—deceit.

Public Law: This will be dealt with in a later article, Gledhill *supra,* starts his discussion of the public law: "it may be a matter of surprise that India, now mistress of her own destinies, should be willing to retain the law, the legal system, and the institutions which Britain imposed on her." p. 147.

[53] Compare N. C. Sen-Gupta, Evolution of Ancient Indian Law, chs. VIII–IX, "Law of Inheritance," with A. Gledhill, *supra,* chs. 15–16. The degree of modification can be seen from the following list of statutes: The Caste Disabilities Removal Act, 1850;

development. The concepts of common law and equity became the common property of Indian law.[54] The association of Colebrooke and Jayannath Tarkapanchanan in translating the last of the great Sanskrit digests in 1797 marked the beginning of a new period. The courts treated Sanskrit legal texts as statutes, whereas previously they were considered merely evidence of unwritten eternal law. The doctrine of *stare decisis* took on all its English rigor.

The Hindu Widows Remarriage Act, 1856; The Native Convert's Marriage Dissolution Act, 1866; The Special Marriage Act, 1872; The Indian Majority Act, 1875; The Transfer of Property Act, 1882; The Guardians and Wards Act, 1890; The Hindu Disposition of Property Act, 1916; The Indian Succession Act, 1925; Inheritance (Removal of Disabilities) Act, 1928; The Hindu Law of Inheritance (Amendment) Act, 1919; The Child Marriage Restraint Act, 1928 (Sarda Act); The Hindu Gains of Learning Act, 1930; The Hindu Women's Right to Property Act, 1937; The Arya Marriage Validation Act, 1937; The Hindu Marriages Disabilities Removal Act, 1946; Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946; Hindu Marriages Validity Act, of 1949.

As India gained her independence the movement was under way to enact a Hindu code relating to personal and family law. The interest it aroused and the degree to which it was debated can be seen from a partial list of Law Reviews and books: Hamid Ali, The Law of Marriage, A Short Study in Comparisons and Contrasts (Hyderabad (Decan), 1944); Vesey-Fitzgerald, S. G., "Projected Codification of Hindu Law," 29 J. Comp. Leg. & Int'l L. (3d ser., 1947) 19–32, 2 India L. R. (1948) 109; Durai, J. C., "Hindu Law: Should It Be Reformed?," 16 J. Comp. Leg. & Int'l L. (3d ser., 1934) 140–4; Rankin, S., "Hindu Law Today, 27 J. Comp. Leg. & Int'l L." (3d ser., 1945) 1–13; Chiu, H. P., "The Roman, Hindu, and Chinese Law of Adoption," 10 Nat. Univ. L. R. (1930) 3–35, 11 Nat. Univ. L. R. (1931) 3–22; Derrett, J. D. M., "Legal Status of Women in India from Most Ancient Times to the Present Day," 43 A.I.R. Journal (1956) 73; Attekar, A. S., The Position of Women in Hindu Civilization (Benares, 1938); Gharpunc, J. R., Rights of Women Under Hindu Law (Bombay, 1943); Burway, R. G., "The Present Position of Hindu Women and the Means of Ameliorating Their Lot," 19 Bombay L. J. (1941) 56–67, 98–114.

Specifically on Hindu Code Bill: Tope, F. K. and Ursekar, H. S., Why Hindu Code? (Bombay, Sharma Mandal, 1950); Haksan, Sir Kailash, "Our Law and the Need for Reform," 1 Indian L. R. (1947) 40; Pusalkar, R. N., "Hindu Code: Is The Reform Imminent?," 37 A.I.R. Jour. (1950) 42; Mehta, Lehar Singh, "Some Implications of the Hindu Code Bill, 1948," 37 A.I.R. Jour. (1950) 26; Parekh, Vallabhadas P., "Desertion is No Ground for Dissolution of Marriage Under the Hindu Code Bill—Its Effect," 38 A.I.R. Jour. (1951) 48; Divan, Paras, "Divorce Law of Hindus, Contemplated Reforms and a Few Suggestions," 40 A.I.R. Jour. (1953) 7; Harhare, Gunde Rao, "Hindu Law and Its Codification," 41 A.I.R. Jour. (1954) 2; Gajendragadkar, K. B., "Observations on the Draft Hindu Code," 23 Bombay L. J. (1945) 307; Gajendragadkar, K. B., "Discrepancies and Anomalies in Hindu Law: Need for Codification," 20 Bombay L. J. (1942) 191; Dubey, Thakur Prasad, "Some Criticism on the Two Bills Proposed to be Introduced in the Assembly," 29 A.I.R. Jour. (1942) 53; Gajendragadkar, K. B., "The Two Bills of Hindu Law," 29 A.I.R. Jour. (1942) 61; Hajela, Rai Bahadur K. S., "The Draft Hindu Code, Its Exposition, Comment, and Criticism," 36 A.I.R. Jour. (1949) 64; Kathalay, B. D., "Hindu Law and Codification," 31 A.I.R. Jour. (1944) 13; Balbir Sahar Sinka, "Codification of the Personal Laws," 16 Sup. Ct. Jour. (1953) 9; Paras Diva, "Hindu Law of Marriage, Divorce and Alimony," 18 Sup. Ct. Jour. (1955) 261; S. V. Fitzgerald, "The Projected Codification of Hindu Law," 2 Indian L. R. (1948) 109.

Some of the provisions were enacted; see Hindu Marriage Act of 1955, Hindu Succession Act of 1956; See Divan, Paras, "The Hindu Marriage Act, 1955," 6 Int. & Comp. L. Q. R. (1957) 263; Derrett, Legal Status of Women, *supra.*

[54] A. Gledhill, "The Influence of Common Law and Equity on Hindu Law Since 1800," 3 Int. & Comp. L. Q. (1954) 576.

Anyone who has taught or studied in an Indian law school knows that the modern jurisprudence is distinctly English oriented. The texts are Salmond and Austin. Even the 26-page *Manual of Jurisprudence* by P. S. Atchuther Pillai, which nearly every Indian student uses to cram for examinations, discusses not only analytical, historical, ethical or critical, or teleological, comparative, sociological, functional realist, and natural jurisprudence but also "economic," "psychological," "ethnological" jurisprudence, and pure science of law. It reviews the positions of Austin, Holland, Salmond, Hohfeld, Kocourek, Kant, Kelsen, Allen, Savigny, Maine, Bentham, Bryce, Comte, Spencer, von Jhering, Ehrlich, Weber, Pound, Stone, Hobbes, Goodhart, and others.

It may be objected that the discussion, while showing a familiarity and acquaintance with English and American jurisprudence, lacks depth of insight. However, if one reads the Indian law journals, he will find depth as well as breadth in Indian jurisprudential thinking. The law reviews are replete with articles on such specific concepts as *"Juristic Personality of the Hindu 'Idol.'"*[55]

The broad juristic philosophy of an emergent socialist state could be seen in many current law reviews.[56] This progressive outlook is shown by numerous excellent articles on criminology, psychology and social ideals. *"Crime and Punishment"* by B. K. Bhattacarjee is one example.[57] He is able to discuss the Soviet penal experience with a detachment not often found in American writings. In *"Social Ideals*

[55] Bijan Kumar Mukherjea, "Juristic Personality of the Hindu 'Idol,'" Indian L. Rev. (1947) 277; A. S. Nataraja Ayyar, "The Juristic Personality of Deities in Hindu Law," 3 Vyavahara Nirnaya (1954) 106.

[56] 4 Indian L. Rev. (1950) 300. Consider the review by Justice P. B. Mukharji of Simpson and Stone's, *Law and Society:*

> "Materials in the pronouncements of the new school of American thought so ably expressed in the superb judgments of such great Judges of America like Holmes, Brandeis, Cardozo, Murphy and Frankfurter do not appear to have provoked the authors to a clearer idea of the shape of things to come in juristic thought.
>
> "The law is the calling of thinkers and jurisprudence, not a mere survey either of cases or of individual decisions determining particular rights. One learns from law an amiable latitude with regard to psychology, beliefs and tastes and acquires that catholic outlook whereby men may be pardoned for the defects of their quality if they have quality in their defects. To be able to see so far as one may and to discern the great forces that are behind every detail makes all the difference between philosophy and disputation and between legal compilation and jurisprudence. . . .
>
> "Excessive preoccupation with the purpose of law (Bentham's 'utilitarianism,' Pound's 'social engineering,' and Jhering's 'means to an end' are referred to), unrelated to the source from where it originates has caused much unnecessary mystification about 'executive legislation,' 'New despotism' and 'Administrative Law.' . . .
>
> "It appears that the future jurisprudence will have for its major concern the functional view of the law which alone can reconcile the demands for change with the demands for security."

[57] 5 Indian L. Rev. (1951) 149.

and the Law," Radhaknal Mukerjee gives a penetrating analysis of law and modern psychology[58] and in other articles[59] it is advocated that the bar receive training in psychology. A glance at any current Hindu law journal will reveal that the articles tend to be more jurisprudential than our own.

Elsewhere, it has been pointed out how India has borrowed from the world in framing its constitution.[60] It has drawn on the common law of England and the civil liberties cases of the United States. Some say that it has taken the concept of preventive detention from Russia. I might digress a moment to show how complete has been the synthesis on preventive detention. The oldest existing statute of which I know is the Bengal Regulation of 1818, though some date its Indian antecedents to 1795. Numerous Provincial Maintenance of Public Order Acts existed in the 19th and 20th centuries, and the British Defence of the Realm and Defence of India Acts (under which Ghandi was imprisoned) were continued and finally embodied in the 1950 Preventive Detention Act (to meet partition's problems). Local, Russian, British law have all contributed.[61]

Though India is evolving many original rules of her own, it need not be assumed that her appetite for imported legal principles is exhausted. She will doubtless pick and choose among the systems with which her citizens become acquainted. India has always shown a tolerance and hospitality for other cultures, even those forced upon her. Hardly a writer facing Indian jurisprudence but remarks on this.[62]

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[58] 2 Indian L. Rev. (1948) 229.

[59] Bimul Kumar Bhattacharya, "Insanity and the Criminal Law," 6 Indian L. Rev. (1952) 41.

[60] H. A. Freeman, New Constitutions of Europe, Asia and South America, 34 Corn. L. Q. (1948) 1; H. A. Freeman, Review, Basu, Cases on the Constitution of India, 53 Col. L. Rev. (1953) 292.

[61] V. G. Ramchandran, The Law of Preventive Detention, Supreme Court Jour., p. 181; A. Gledhill, The British Commonwealth, vol. 6, India, p. 173; A. K. Gopalan v. The State of Madras, A.I.R. 37 (1950) S.C. 27.

[62] Seymour Vesey-Fitzgerald, "Law, Hindu," 9 Encycl. of the Soc. Sciences, p. 262.

> "The greatest contribution to posterity made by the Hindu tradition was the broad-mindedness, sympathy, and the toleration of different viewpoints exhibited almost alone in India amongst the civilized communities of the earlier days.
>
> "The modern Hindu lawyer, regarding his ancient law with patriotic pride, looks upon English law also with possessory affection. He would not separate even if he could the two systems of which he is the living synthesis, and in adapting his inherited conceptions to the needs of today he is merely doing openly and with modern tools what in another age and another fashion was done by the sages and commentator before him, above all by Vijnanesvara."

In the concluding chapter of *Hindu Polity,* Jayaswal writes:

> "The constitutional progress made by the Hindus has probably not been equalled much less surpassed by any polity of antiquity. The great privilege of the Hindu at the same time is that he is not yet a fossil; he is still living with a determination which a great historian has characterized as a tenacity which bends but does not break. The Golden Age of his polity lies not in the Past but in the Future." K. P. Jayaswal, *Hindu Polity,* 2d ed., Bangalore, 1943, pp. 366–7.

A Suggested Approach. Perhaps the essence of my approach can now be stated. It is to recognize that we are concerned with modern law, even when we review ancient law for comparison; that modern law in all countries is a synthesis of old and new, Western and Eastern; that for adequate study we divide law into subjects, some of which are deeply rooted in old traditions and culture and some of which are related to, but largely replace, those traditions; that we should clearly distinguish the area studied and the approach needed; that we recognize that in areas like "family law" which are closest to custom, the variations between two states in America or two sections in India may be as great as the dissimilarities between East and West; that in many areas no one can tell from what law a given quotation comes. I venture to say that there is no Eastern or Western philosophy and no Eastern or Western law.

VERA BOLGÁR

The Concept of Public Welfare

An Historical-Comparative Essay

". . . Crito, I owe a cock to Asclepius
will you remember to pay the debt?"
". . . Winter closed his eyes for a moment before he answered,
'the debt shall be paid!' "

John Steinbeck, The Moon is Down (1941).

Of all social concepts, public welfare is one of the most ancient and at the same time the most elusive. Like all such concepts, it has a dual nature. First, it is an abstract idea prone to elaboration by philosophical thought; second, it is used as the motivation for such concrete measures as, under the influence of current philosophic ideas, are being carried out in a given society. However, times and philosophies change, and with them the idea of public welfare changes requiring new social measures which should serve to carry it into action. The great volume of literature which has appeared around the concept of public welfare in recent years, especially since the end of the last war, evinces renewed interest both in the philosophical reformulation of the concept and also in the social measures by which it might most adequately be realized. But this literature, however rich in debates and controversies on concrete ways and means, does not give a precise theoretical formulation of the essence of public welfare as it is conceived today. Indeed, since Bentham's greatest good of the greatest number and Karl Marx's universal satisfaction of needs in accordance with universal wants, both obsolete in their vagueness and the latter also in its sole means of realization, there has been no attempt to transpose the concept of public welfare into the contemporary context. This prompted the topic of this article, which proposes to discuss in legal terms the present-day meaning of public welfare and to examine current attitudes towards its functions of over-all social control. In addition, to demonstrate the influence of public welfare specifically on law, two fields have been selected, which, in the author's opinion, represent the crucial points at which society accepts the regulations carried out in the name of public welfare. These, at the same time, are essential aspects of individual activity as represented by freedom of acquisition and freedom of transactions. These fields are the law of property and the law of contract.

To present a social concept in its contemporary setting necessitates,

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however, a survey of its evolution through history. Therefore, this article is divided into three parts. The first seeks to define public welfare in relation to its legal meaning; the second part to survey those periods in history that have shaped our present concept of public welfare and our existing institutions of property and of contract; while the third part will summarize current reactions to public welfare ideology and the influence of this same ideology on recent developments in the laws of property and contract.

I

The essence of public welfare is the obligation of the individual to the community. Although symbolized ages ago in the immortal words of Socrates, quoted above, it is a strange historical phenomenon that the preoccupation with public welfare in this sense has been intensified in Western society only in periods when the established order of things was in danger of being overthrown. This has happened whenever new forces emerge with new impact on existing conditions; forces externally stimulated by contact with another civilization, or internally activated by the groping of man for new values and ideals because the old have lost their persuasive force. Thus, in times as far back as the Greek world, the contest between Spartan militarism and Athenian democracy —two opposite concepts embodying opposite aims—terminated with the victorious assertion of the ethical common weal and the rule of law as formulated by Plato and Aristotle, and continued thenceforward intermittently as the moving force of Christianity in the new world that rose on the ruins of the Roman empire; it formed the basis of Thomas Aquinas' social and legal concepts when this same world was consolidated in the medieval empire of the Church; it became the social justification of Robespierre's *Comité de Salut Public* at the dramatic end of feudal society; it furnished the legal framework for the no less dramatic beginnings of colonial independence as embodied in the United States Constitution, as well as the philosophy for the industrial revolution as expressed in Jeremy Bentham's utilitarian and legislative theories; and scarcely one half of a century later, it motivated the social utopia of Karl Marx, at a time when the unbridled *laissez faire* of the capitalistic economy presaged the increasing necessity of state control in the interest of the majority that, as the economically weaker part of the population, was exposed to all the disadvantages of the "do as you please" attitude. Thus, it was in the interest of public welfare that the state gradually absorbed the control and direction of ever-widening areas of social life until this reached the two extremes between which we now stand: totalitarian communism in the East and the democratic welfare state in the West.

And thus it happens that the ancient contest between Sparta and Athens repeats itself again. In its present phase, however, this contest is not a thing of the past; we are its immediate witnesses and its participants. Again public welfare is invoked as the basic principle embodying opposite aims to be reached by opposite ends, and again it offers itself as the guiding notion to help man, in the confusion of ideas generated by a new age, to choose either between two altogether different welfare philosophies or to reshape his inherited ideals into a more up-to-date mold. However, by the very reason of its frequent use for opposite aims, the danger once more arises that public welfare, instead of serving as a guiding principle, may degenerate into a mere political slogan, and as such, in practice be reduced to a means for opposite ends and in theory to a cover for nominalistic insignificance. To avoid this, public welfare should be envisaged exclusively in its function of social control through its most effective means, which is law, and its essence analysed solely within the context of social purposes as expressed in legal rules.

Legal analysis, however, presupposes legal definition of the concept analysed. Should public welfare be defined in its legal meaning, this definition then must contain the outstanding characteristic of law: its embodiment of social values and social reality as expressed in the concrete formulation of positive legal norms which seek to achieve social aims (values) through concrete regulations (reality). In the constant shift of actual conditions, however, values always anticipate reality, and the gap between the "ought" and the "is" is never closed. The structure of a given society is determined as well as revealed by the width of this gap, which is enlarged or narrowed by the extent to which society accepts regulation by legal means for the purpose of achieving social values. Therefore, if the "ought" in society is the aim of public welfare, the point at which social value and legal reality converge is the extent to which society accepts legal regulation in the interest of public welfare. Society, however, is not an abstract entity. It is the aggregate of individuals, who are endowed with similar feelings, passions, and volitions, and who, in accepting legal regulation, at the same time accept the detriments that such regulation entails. The chief of these is the sacrifice of certain of their attributes which belong to them as individuals and also are conceived of as liberties. These liberties, on the other hand, may also be expressed in terms of social value and social reality; they are mere values if their existence is only theoretically formulated, but they become reality if their theoretical existence is implemented by concrete legal redress. This combination of theory and practice, however, has an acute social significance. Through the intervention of law, by granting legal redress to individual liberties, these liberties are raised into the category of individual rights.

The legal definition of public welfare is therefore the extent to which a given society accepts regulation by law in the sphere of individual rights and, conversely, the extent to which these rights, if violated, are given protection by law.

In the following, public welfare will be discussed in this sense.

II

Even a brief historical survey of the development of the concept of public welfare as well as of the institutions of property and contract makes it necessary to examine their origins. In the present instance, this is the more inevitable as they derive from the two sources from which Western civilization drew its originality and strength—Greek political thought and Roman law—and whatever changes they went through in the course of time, either as abstract concepts or as concrete legal institutions, these changes did not alter their basic structure.

The comparison of these two sources from a distance of many-a-hundred years points first to the contrasts. Although all political thought begins with the Greeks, actual Greek history is an unholy sequence of anarchies and tyrannies, interrupted only by the unique magnificence of the brief period of Athenian democracy. Roman political thought was nil, yet it produced the Roman Empire. Law in Greek thought was but one part of the basic trilogy of religion, law, and morals;[1] in Roman thought *ius* was law and nothing but the law.[2] Law in Greece was a flexible set of forms ever yielding to changing substance; law in Rome was a rigid scale of actions into which substance had to be squeezed. The source of Greek law was the state; the source of Roman law was the individual.[3] Law in Rome was an aristocratic science professed by the respected few;[4] law in Greece was the way of

[1] Ernest Barker, The Political Thought of Plato and Aristotle, (1906) Introduction, at 7. The Greek expressions for law and justice, *Themis* and *Dike,* are practically untranslatable and undefinable. This is confirmed among others, by Cicero and Max Radin. As notions they represented all the social connotations of right conduct, right behavior, right advice, until eventually they crystallized, in *Themis,* as the authoritative advice of the gods, and, in *Dike,* as the idea of justice, as well as its external manifestations, the judicial process, the various actions, and even the results of judgments, reparation or penalty. *Cf.,* P. Vinogradoff, Outlines of Historical Jurisprudence, Vol. 2, The Jurisprudence of the Greek City (1922) 19; Max Radin, "A Restatement of Hohfeld," 51 Harvard Law Review (1937–38) 1145, J. Walter Jones, the Law and Legal Theory of the Greeks (1956) 24 *et seq.,* 33; Louis Gernet, Droit et Société dans la Grèce Ancienne, (1955), ch. 5; Alfred Verdross, Grundlinien der antiken Rechts- und Staatsphilosophie, (1948) 15 *et seq.;* Rudolf Hirzel, Themis, Dike und Verwandtes, (1907) chs. 1 and 2.

[2] Therefore also, the strict division between law, *ius,* and religion, *fas,* and the enforcement of *ius* irrespective of its religious or ethical content. *Cf.,* Jones, *op. cit.* 33.

[3] Rudolf v. Jhering, 2 Der Geist des römischen Rechts, (1907, 6th ed.) 147 *et seq.;* Hirzel, *op. cit.* 129; Max Kaser, Das römische Privatrecht, (1955) 164.

[4] Fritz Schultz, History of Roman Legal Science, (1953) 24, 60 *et seq.;* Anton-Herman Chroust, "The Legal Profession in Ancient Republican Rome," 30 Notre Dame

life. Greek law was based on their fabulous *metrón,* the equitable medium; Roman law on the *imperium* of the elected magistrate.[5] Greek law was administered by huge courts with rotating judges and jurors;[6] Roman law by one *iudex* instructed by one *praetor.* Greek law knew no vested rights; Roman reverence for rights amounted to religion. Greek law knew no categories; Roman law created them. Ownership in Greece was the relatively better title between parties of equal standing and equal burdens of proof, and the main creator of title, adverse possession, was unknown;[7] ownership in Rome was the absolute *dominium* to be proved by plaintiff, while adverse possession created irrebut-

Lawyer (1954) 97; *id. ibid.,* "The Legal Profession in Ancient Imperial Rome," (1955) 521; Wolfgang Kunkel, Herkunft und soziale Stellung der römischen Juristen (1952).

[5] *Imperium* was the supreme Roman governmental power, unchecked but balanced by the creation of several *imperia* equally vested with *imperium potestasve,* which resulted in the collegiality of functions within the unity of authority. This involved the vesting of the two chief magistracies, that of the consul and the praetor, with *imperium* as well as *potestas;* while on the lower levels of government, the two *quaestores,* the two *tribunes plebis,* and the four *aediles* were vested only with *potestas* without *imperium.* On the structure of Roman public law, *cf.,* the classic treatise by Theodor Mommsen, Römisches Staatsrecht (1952, photomechanic reprint of 3rd ed. 1887), the passages on *imperium* in general, Vol. 1, 22 *et seq.* On the gradations of public power, *cf.,* Giuseppe Carle, Le origini del diritto Romano (1888) 235 *et seq.*

[6] B. W. Leist, Graeco-italische Rechtsgeschichte (1884) 658 *et seq.;* Vinogradoff, *op. cit.* 145 *et seq.;* E. Paoli, Studi sul processo Attico (1933) with Foreword by Piero Calamandrei. A graphic and exhaustive discussion of the Greek trial in Barna Horvath, "Der Rechtsstreit des Genius," 22 Zeitschrift für öffentliches Recht (1942) 126 *et seq.,* based on the trial and indictment of Socrates, whose strange, new δαιμονια, in addition to corrupting the youth of Athens, constituted a clear and present danger to the existing government.

[7] This applied only to acquisition of land. For chattels one year's possession was sufficient to acquire title. *Cf.,* Gernet, *op. cit.,* 71, 72. The relativity of ownership is manifest in the remedial setup; there was no sharp division between possessory and petitory remedies; one action, the *diadikasia,* was used for proof of title, especially in successions, and another, the *dike exoules,* for clothing title with possession. This action, the Greek form for disseisin, was a criminal action available in cases of self-help in the recovery of possession (its creation perhaps motivated by the *"in Attica so beliebten Prügeleien"*), and lay only after the adjudication of title by *diadikasia.* Its unique social importance was the privilege of enforcement granted by it through the state, the enforcement creating substantive ownership rights; *cf.,* the classic discussion by Ernst Rabel, "Dike εξούλεσ und Verwandtes," 36–37 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Rom. Abt. (1915) with modern references at 340 *et seq.;* for a comparison of the relativity of ownership with modern laws, *cf.,* Fritz Pringsheim, The Greek Law of Sale (1950) at 12: "transfer of property as between seller and buyer," and "transfer of title" in the English Sale of Goods Act, 1893, ss. 16, ff., 21 ff.; the United States Uniform Sales Act, ss. 17 ff., 23 ff.; Article 1583 of the French *Code Civil, ". . . la propriété est acquise de droit à l'acheteur à l'égard du vendeur . . .";* also Eighth Hague Conference on Private International Law, Draft Convention on the Law Governing Transfer of Title in International Sales of Goods, Article 2, "The law governing the contract of sale determines as between the parties: . . . (4) the validity of clauses reserving title to the goods in the seller"; *cf.,* 5 American Journal of Comparative Law (1956) 650 *et seq.;* also Vinogradoff, *op. cit.* 213, 220 *et seq.;* Jones, *op. cit.* 205 *et seq.;* Max Kaser, "Der altgriechische Eigentumsschutz," 64 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Rom. Abt. (1944) 134 at 148; Ludwig Mitteis, Reichsrecht und Volksrecht (1891) 70.

table rights.[8] Greek obligations did not give rise to enforcement without tangible evidences of proof, and while *Graeca fides* operated at times even *contra fidem veritatis,*[9] *Romana fides* created the informal

[8] The absolute power of the owner, however, was not the initial Roman concept. Not until the formulation of Celsus included in the Justinian Code (*duorum quidem in solidum dominium vel possessionem esse non posse*) did it find its way into the law and, resurrected by the Napoleonic codifications, clothed man's desire to have and to hold with the invisible magic of absolute ownership. *Cf.* for its historical development, Vera Bolgár, "Why No Trusts in the Civil Law?," 2 American Journal of Comparative Law, (1953) 204 *et seq.* Max Kaser, Eigentum und Besitz im älteren Römischen Recht (1956) 277 *et seq.,* derives the transition from relative to absolute ownership in part from the procedural concurrence on private lands of the actions *vindicatio* and *uti possidetis,* and in part from the *Zeitgeist* of the late Republic that encouraged every demonstration of individual power. For acquisition of title through adverse possession (*usucapio, longi temporis praescriptio*) *cf.,* Vincenzo Arangio–Ruiz, Istituzioni di Diritto Romano (1937) 208 *et seq.*

[9] This is the expression used by Pseudo-Asconius (Cicero, in Verrem II, 1, 36) which, according to Ludwig Mitteis, *op. cit.* 459 *et seq.,* contained no disparaging connotation and described only the legal nature of the Greek contract in writing, the *syngrapha.* This contract, drawn up *more institutoque Graecorum,* incorporated mostly the contract of loan, the *daneion,* which came to cover, similarly to the Roman *mancipatio,* a varied scale of purposes, at times contrary to the formally alleged object of the transaction, i.e., *contra fidem veritatis.* Legally, the problem is twofold: substantive with respect to the right created by party autonomy, procedural with respect to the evidential value in court. According to Pringsheim, *op. cit.* 43 *et seq.,* the procedural aspect is dominant: the *syngrapha* was accepted by the courts as evidence *per se;* the substantive aspects are emphasized by Jhering, 3 *op. cit.,* chs.: Die Schleichwege des Lebens, Die künstlichen Mittel; by Ernst Rabel, "Nachgeformte Rechtsgeschäfte," 27–28 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (1906) 290, 311, 376 *et seq.;* by Emilio Betti, "Bewusste Abweichung der Parteiabsicht von der typischen Zweckbestimmung (causa) des Rechtsgeschäfts," Festschrift für Paul Koschacker (1939) 298, who opposes simulated and illegal transactions. From the aspect of public welfare, i.e., of the interaction of legal and social rules, social reliance on informal promises, which at law becomes the consensual contract because enforced by the courts, is contingent on the flexibility of a legal system in adapting old forms to newly emerging needs. Thus, in Gernet's treatment, *op. cit.* 173–236, the problem is not envisaged through the category of the Roman consensual contract but through the *données immédiates* of the social conditions of Athens in the 4th and 5th centuries, when its emergence as the leading Mediterranean port necessitated legal recognition of the Athenian law merchant by incorporating its special usages and customs into municipal law, and concurrently, in the interest of public welfare required a specialized system of actions, the *emporikai dikai,* for the speedy settlement of commercial claims. In the context of such social "givenness," it is immaterial whether *Graeca fides* did or did not create the category of consensual contracts—legal categories did not enter into Greek law anyway—the only problem is whether enforcement was given or not given to informal agreements. Here the extant evidence is mixed: although the ruling principle was, under benefit of commentary, that "all conventions make law as between the parties," and that consent should be given *exón,* freely, and *pístis,* in good faith, the courts preferred such evidential buttresses of consent as the *homología,* the formal oath, or even the simple depositions of witnesses. This led in the course of time to the predominance of formal over substantive validity. From here across the ages two comparisons occur: Article 1134 of the French Code Civil, "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites," and the compelling evidence of form in the law of negotiable instruments; *cf.,* Bundesgerichtshof, November 15, 1956; Tribunal Commerce d'Ostende, February 3, 1955; Corte di Cassazione, December 16, 1936; March 25, 1938; November 5, 1953; *cf.,* Internationale Rechtsprechung zum Genfer einheitlichen Wechsel- und Scheckrecht (ed. v. Caemmerer) Tübingen, 1954.

consensual contract. The "unsystematic Greek mind" easily divided legal title and equitable use;[10] to the Roman mind title was indivisible.[11] Greek law was cosmopolitan; Roman law narrowly provincial. Greek courts followed principles on the most advanced levels of private international law; access to and equal standing in the domestic courts by foreigners, and the consideration—although as yet not the direct application—of foreign legal principles by the domestic forum;[12] the *ius civile* of Rome was accessible only to the chosen *Quirites,* and the foreigner had practically no rights. And yet, the meeting of these two diverse systems produced Western legal civilization, and their impact is still felt today. The genius of the Roman *praetor* created under the influence of Greek thought and Greek administration of justice a method of legal application and interpretation by which the aiding, correcting, and supplementing influence of Aristotle's *epieikeia* still penetrates the interstices of strict positivistic formalism,[13] and developed out of the rigid, provincial law of a nation the law of nations.

Public welfare, however, is a social concept expressed in its concrete form by those rules of law that regulate the relations between the individual and the state. And here again the contrasts: Both Athens and Rome owed their unique position of political and economic success, among other factors, to a highly developed and intricate system of capitalistic economy that respected and protected the individual rights of

[10] Jones, *op. cit.* 215, 212, gives the example of the *paramone,* the Greek manumission by which a slave acquires legal ownership of himself, i.e. his freedom, upon payment of a sum while the payee retains the beneficial ownership of his services. In the Hellenistic age, the *paramone* was used to pay off interest on loans, or for the repayment of the capital; Pringsheim, *op. cit.* 209 *et seq.,* construes as a resulting trust bankers' loans from their client's deposits, the trust resulting in the borrower.

[11] Together with the absolute *dominium,* the indivisibility of ownership is also a late Roman development; *cf.,* the passages of Gaius and Paulus: Gai. I. 54, *Ceterum apud cives Romanos duplex sit dominium . . . ;* II. 40, *. . . sed postea divisionem accepit dominium;* II. 157, *. . . heredes ideo appellantur . . . et vivo quoque parente quodammodo domini existimantur;* Paul. D 28. 2. 11, *In suis heredibus evidentius apparet continuationem dominii . . . quasi olim hi domini essent qui etiam vivo patre quodammodo domini existimantur . . .*" Also, Theodor Mommsen, *op. cit.,* 9, 10, n. 2; Jhering, 1 *op. cit.* 17–180; F. Girard, Manuel Élémentaire de Droit Romain (1918) 266; Ernst Rabel, "Die Erbrechtstheorie Bonfantes," Zeitschrift der Savigny-Stiftung für Rechtsgeschichte," Rom. Abt. (1930) 320 *et seq.*

[12] G. M. Calhoun, "Greek Law and Modern Jurisprudence," 11 California Law Review (1923) 295 at 307 *et seq.;* F. Leist, *op. cit.* 90, 658 *et seq.;* Max Kaser, *op. cit.* n. 3, 184 *et seq.;* H. F. Hitzig, "Der griechische Fremdenprozess im Lichte der neueren Inschriftenfunde," 27–28 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Rom. Abt. (1906) *et seq.,* Hessel E. Yntema, "The Historical Bases of Private International Law," 2 American Journal of Comparative Law (1953) 297 at 301.

[13] French C. C. Article 4; Austrian C. C. § 7; German ZPO § 286; Swiss C. C. Article 1; the Belgian Law of December 23, 1946, *portant création d'un Conseil d'État;* Cardozo, J. in Van Beeck v. Sabine Towing Co., 300 U.S. 342 at 350–51 (1937); Jackson, J. in State Tax Commission v. Aldrich, 316 U.S. 174, 185, 202 n. 23 (1942); Slifka v. Johnson, 161 F.2d 467, 469–70 (2d Cir. 1947); *cf.,* Jerome Frank, "Civil Law Influences on the Common Law—Some Reflections on 'Comparative' and 'Contrastive Law,'" 104 U. of Pennsylvania L. R. (1956) 887 *et seq.,* at 889–891.

ownership and trade,[14] but the Greek state remained the ultimate depository of these rights which it could grant or withdraw as a matter of course for purposes of equal distribution of wealth, while to the Romans the state meant, at least until a fairly late epoch, merely a homespun committee for the administration of communal affairs that functions best if it governs least.[15] In Greece the strongest title was derived from public sources, and although freedom of alienation through gift or sale was widely recognized, it never became an established principle.[16] In Rome ownership was absolute and contractual freedom unlimited. The governing rule was that of individual autonomy:[17] *meum esse aio; uti lingua nuncupassit ita ius esto;* raised to its peak by the praetorian formula in enforcing consensual contracts, *quidquid dare facere oportet ex fide bona,* by which for the first time in legal history a *social* concept, *fides,* was given *legal* substance by protection through legal redress.[18] The primacy of individual autonomy stamped its mark on the most important public legal function: legislation was performed within the forms of the private contract substituting for the *spondesne?-spondeo* of the private stipulation the public *rogatio, velitis iubeatis Quirites ut?,* which in the affirmative became the law, the *communis reipublicae sponsio.* The only limits to individual

[14] Robert v. Pöhlmann, Geschichte der sozialen Frage und des Sozialismus in der antiken Welt (1925 3rd ed.) 116 *et seq.;* Pringsheim, *op. cit.* 232, 242.

[15] Carl L. Becker, Freedom and Responsibility in the American Way of Life (1945) 12 *et seq.,* refers thus to the early American settlers. But his characterization might easily be transposed in space and time from the valley that lies between the Hudson and the Mississippi to the valley between the Po and the Tiber.

[16] Although the concept of eminent domain was unknown to the Greeks, the state resorted to it frequently as Greek practice needed no concepts for action, *cf.,* Jones, *op. cit.* 199. Gernet, *op. cit.* 81, mentions the legal representation of guardians and the establishment of foundations, which were accepted in Greece as a matter of course, while in Rome there was no conceivable approach to the former and for the latter the concept of legal personality had first to be devised.

[17] Jhering, 2 *op. cit.* 147 *et seq.;* Kaser, *op. cit.* n. 3, 164. The emphasis on individual autonomy motivated also the execution of judgments which were aimed rather at the subjection of the will of the debtor than at the objective satisfaction of the creditor. *Cf.,* Leopold Wenger, "Institutionen des römischen Zivilprozessrechts" (1925) 212 *et seq.* (English translation by O. H. Fisk, New York 1940, 222 *et seq.*).

[18] Roman prudence, however, restricted the application of *fides* to certain transactions: sale, loan, deposit, mandate, *societas;* and *fides* as such was subject to judicial interpretation. These actions were *in factum concepta,* similarly to the common law, when the question of reasonableness had to be determined by the jury. *Cf.,* Fritz Schulz, History of Roman Legal Science, (1953) 83; G. Lepointe et R. Monier, Les obligations en Droit Romain et dans l'Ancien Droit Français, (1954) 84 *et seq.;* F. de Zulueta, The Roman Law of Sale, (1945) 8 *et seq.,* 49 *et seq.;* Ernst Rabel, Grundzüge des Römischen Privatrechts, (1955, 2nd ed.) 11; Arangio-Ruiz, *op. cit.* 124, 298 *et seq.;* Kaser, *op. cit.* n. 3, 441. For a masterful elaboration of the limitations on contractual freedom in Roman Law, *cf.,* Max Weber, On Law and Economy in Society, Max Rheinstein ed., Twentieth Century Legal Philosophy Series, (1954) 129 *et seq.*

[19] Therefore, the famous rule, *ius publicum privatorum pactis mutari non potest* had a double meaning: the individual may not deviate from the stipulations of the social contract, but the community may not introduce any *lex privi,* i.e. any privi-lege, either. This is in the words of Jhering, 1 *op. cit.* 216 *et seq.*

autonomy were imposed by the rational as well as pragmatic limits of that particular legal institution within which party antonomy unfolded; freedom of ownership was synonymous with freedom of property; the burdens on it were on the owner who professed his *dominium,* while the property itself had to pass unburdened from one owner to the other.[20] The limits of contractual autonomy, on the other hand, were automatically given by the limits of the then known contractual categories of *dare, facere,* and *praestare,* obviating as a matter of course obligations for *impossibilia* or *contra bonos mores.*[21]

However, comparison of the basic social attitude towards law reveals a fundamental similarity between Greece and Rome. This is the deep belief in and voluntary subjection to the rule of law. To both nations, long before the times of Locke and Rousseau, acceptance of the ultimate control of law meant adherence to the social contract, which in its positive formulation represented also the ultimate guarantee of the public welfare. Hence in Greece, the commanding authority of the laws of Draco and Solon long after their enactment, while the story of the Twelve Tables, the stone-carved Magna Charta of the Roman *plebs,* is too well known to be retold. Due, however, to the particular Roman bent, the same rule of law that was but part of the over-all social control in Greece, acquired in Rome the exclusive character of law. This happened by guiding the most important and most frequently occurring individual transactions into the channels of procedural uniformity and conferring thereby on these transactions the character of legal rights and duties. It was through this interplay of individual autonomy and legal procedure that the basic categories of the civil law system were created: the various transactions in family relations, in property, and contractual obligations crystallized in the institutions of *patria potestas, dominium,* and *obligationes ex contractu,* the last enlarged in the course

[20] The governing rule was *salva rerum substantia.* The only acknowledged burden on the property was the servitude, recognized, however, only in cases where it was economically advantageous to the property itself or otherwise practically warranted. *Cf.,* Jhering, 2 *op. cit.* 149 *et seq.,* 220 *et seq.*

[21] D 44.7.3; D 50.17.185; D 45.1.26; C 2.3.6. *Cf.,* Salvatore Di Marzo, Le basi romanistiche del Codice Civile, (1950) 212 *et seq.;* Kaser, *op. cit.* n. 3, 408 *et seq.;* Jhering, 3 *op. cit.* xxxvi. That the Romans did not exploit party autonomy within such weak limits and, in addition, in a *laissez faire* economy, even their warmest admirers may not deny; but, in addition to being Romans they were also Latins, and the *mores maiorum* exercised its mitigating influence on the harshness of law. It is instructive to note in this respect also our *Leitmotiv,* the transforming element of social acceptance on law. The *Lex Poetelia* forbade the Shylockian measures of the *manus iniectio,* (which according to Jhering, were never applied, for what's the use of excising pounds of flesh from the defaulting debtor if he can't pay anyway, and if, usually, acting on *plus minusve secuere,* the clipping of one earlobe or one nostril sufficed to produce the debt?) It was also under the influence of the *ius honorarium,* that the interests of the debtor and not exclusively those of the creditor were given consideration. *Cf.,* Leopold Wenger, Zur Lehre von der Actio Judicati (1901) 111 *et seq.; id. op. cit.* n. 17, ch. 3.

of time to include successions and associations.[22] The basic unity of Greek society is paralleled by the basic unity of Roman law. *Res publica* were originally the things common to all, the *via, agra, sacra;* their protection at law equally a concern of all through the *actio popularis;* the private property of the state would have meant to the Romans a senseless contradiction.[23] Similarly, the categories *populus Romanus* and *civis Romanus* comprised the totality and unity of social duties and legal rights, unfortunately also that of economic advantages which, as the Empire grew, came to overshadow the originally moral aspects.[24] The much discussed rule, defining *publicum* and *privatum ius,* attributed to Ulpian, referred in the main to the division of law for the purposes of legal studies;[25] the strict dissection of law into spheres public and private came only at a later stage. The moment, however, that the dividing line was drawn, the inference arose of the primacy of the public over the private sphere which entailed also the primacy of public over private interests. It is perhaps not due to chance that, once this primacy was firmly established, it also marked the line of social decline and legal degeneration, in the course of which *res publica* became an entity separate and abstract from the nation, with its functions of power and intervention progressively increased and pre-empted by the class which gradually filled the offices of government, until in the end the legal *imperium* of the elected Roman magistrate was transformed into the illusory power of illegal force.

As a queer paradox, the ideology for this process of gradually increasing state power was furnished by the Greek formulation of public welfare. Although it is in general fairly hard to trace the concrete influence of Greek ideas on Roman thought, in this particular instance the date, the point of contact, as well as the transmitting and receiving media are

[22] Jhering, *op. cit.* Vol. 1, 220 *et seq.,* Vol. 2, 65. Gai. Lib. 4: . . . *his autem potestatem facit lex pactionem quam velint sibi ferre, dum ne quid ex publica lege corrumpant.* It must be noted that control was exercised through publicity which conferred, as it were, the *toga legalis* over certain transactions: the *coemptio* and *confarreatio* for marriage, the *testamentum in comitiis calatis,* and later the *testamentum per aes et libram* for wills; for transfers of title and contractual transactions the *manicipatio,* the *nexum,* and the *in iure cessio.*

[23] Indeed, in the structure of Roman legal redress this was the most advanced point at which individual interests were granted recognition, *cf.* Jhering, *op. cit.* Vol. 1, 210 *et seq.,* Vol. 3, 355; Arangio-Ruiz, *op. cit.* 69; Kaser, *op. cit.* n. 3, 174, 261, discussing the evolution of the *fiscus* from the private property of the *Princeps* to its absorption by the *aerarium populi Romani.*

[24] In the end this category became diluted anyway as the Constitutio Antoniniana of Caracalla conferred citizenship *en bloc* on all the residents of the Roman empire. Rome had no immigration laws.

[25] D 1. 1. 2–1. 1. 4: *Hujus studii duae sunt positiones: publicum et privatum. Publicum ius est quod ad statum rei Romanae spectat: privatum quod ad singulorum utilitatem. Sunt enim quaedam publice utilia quaedam privatim. Cf.,* Artur Steinwenter, "Utilitas publica—Utilitas singulorum," 1 Festschrift Paul Koschacker (1939) 84 *et seq.;* Kaser, *op. cit.* n. 3, 175; Arangio-Ruiz, *op. cit.* 29.

in clear historical relief.[26] In the year 155 B.C., Carneades, the then head of the Academy, gave a series of lectures in Rome which were destined to start Roman speculation towards the problem of public welfare, channelling it along the lines of finding a satisfactory solution for the relations between the individual and the state, and within these relations for an adequate co-ordination between individual and social justice as well as between individual and social utility. The date of these lectures marked, as it were, the twilight between two Empires. Hellas was gone, the vestiges of her intellectual achievements[27] turned by Carneades into tortuous sophistry, while Rome was still at the threshold of Caesars' world conquests and Augustus' enlightened absolutism, which were to extend and consolidate the Roman rule. The Forum, however, was already the center of world trade, and hence world litigation, and the peregrine praetor thought it necessary to publish his edicts for the public to acquaint it with the crystallizing rules of legal remedies, and he began to experiment with the *formula,* a handier device for the administration of justice than were the old *legis actiones,* which sufficed in the litigation between the cautious Roman peasants of old,[28] but had lost for their descendants, now wealthy knights, bankers, and merchants, their meaning and use.

No wonder that from this pre-eminently legal background the concept of public welfare emerged altogether different from the all-embracing Greek *koine synferon.* Apart from the fact that the concept itself was of no use until then to the pragmatic Roman mind, unaddicted to conceptual thinking, they adopted it in the Carneadan formulation as the justified use of force in the ultimate interest of social utility. This identification of social utility with public welfare appeased at that time the Roman conscience for the lot inflicted on Carthage and, in addi-

[26] Steinwenter, *loc. cit.* 88. *et seq.;* Bertrand Russell, A History of Western Philosophy (1945) 236 *et seq.*

[27] This intellect gave to posterity the mixed heritage of political theories including such extremes as the rule of law and the planned unity of totalitarian legislation; it elaborated for the later use of Hobbes, Austin, and modern analytical jurisprudence the theory of the nature and functions of positive law; it furnished the concept of the social function of property to Duguit and to the *Bonner Grundgesetz,* and to 19th century codifications the idea of individual law-creating autonomy; it projected the extreme limits to all future *Weltanschauung* between the ultimate reality of ideas and the ultimate value of rational thought; it solved the everlasting conflict between positive laws and natural justice; but left to the genius of a later age the elaboration of Plato's vision of men chained to the walls of a cave by their benevolent governments, lest they be blinded by the light without. *Cf.,* G. M. Calhoun, *loc. cit.* 309; A. Verdross, *op. cit.,* 150–57; Dirk Loenen, Protagoras and the Greek Community (1940); Barna Horvath, "Die Gerechtigkeitslehre des Sokrates und des Platon," 10 Zeitschrift für öffentliches Recht (1930–31) 258; Bertrand Russell, *op. cit.* chs. 1, 2; Ernest Barker, The Political Thought of Plato and Aristotle (1906).

[28] An example of the concurrent development of law and equity: the *lex Aebutia* authorized facultatively the formulary procedure with the *legis actio;* the *lex Julia* of Augustus made it exclusive. *Cf.,* Leopold Wenger, Zur Lehre von der Actio Iudicati, 111 *et seq.;* de Zulueta, *op. cit.* 18 *et seq.*

tion, fitted perfectly the social conditions of the period. Moreover, the Roman medium who first absorbed and then disseminated the concept of public welfare was Cicero,[29] who in his endeavors to uphold against Carneades the truly stoic tenets of virtue and justice, was nevertheless just as eager to maintain the *status quo* of his society that guaranteed by the very means propounded by Carneades the vested rights of the *possidentes,* to whom Cicero also belonged. Thus, the Roman concept of public welfare saw life as *utilitas publica,* and became the foundation of the state, of course, the Roman state, wherein *iustitia naturalis* and *utilitas civilis* were reconciled as much as possible, but in case of opposition the interests of the individual yield to the interests of public utility. This view also accorded with the attitude of the true Roman as expressed by Cicero, to whom *servire communi utilitati* meant unconditional surrender to the state, and as the state united authority and justice, the logical conclusion was the acceptance of justice from the hands of those who wield authority.[30] From hereon the trend is obvious. *Utilitas publica* became legal norm in the *lex de imperio,*[31] the *Einführungsgesetz* of Augustus, who still was anxious to clothe his absolutism in legal garb. In the following centuries, however, this same *utilitas publica* came to cover indiscriminately imperial measures of taxation, fiscal regulation, military matters, and expropriations; in short, any policies of the government opposed to the equitable interests of the individual.[32] The rest is known. Rome became ripe for fall under the force of Eastern aggression. The ruins buried *utilitas publica* together with the two greatest achievements of antiquity: the ethical community of Aristotle and the natural, eternal, immutable justice of Cicero. They remained buried until the time came for a new creed and a new society to give them new forms and thereby new life.

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[29] Steinwenter, *loc. cit.* 88 *et seq.;* Theodor Mommsen, Römische Geschichte Vol. 4, 537 *et seq.;* G. H. Sabine-S. B. Smith, Cicero on the Commonwealth (1929) 44 *et seq.;* Robert N. Wilkin, Eternal Lawyer (1947); Emilio Costa, Cicerone Giureconsulto (1927) at 17, 21, 19, 27.

[30] Huntington Cairns, Legal Philosophy from Plato to Hegel (1949) ch. 4, 151: "Nothing . . . was so completely in accordance with the principles of justice and the demands of nature (by which he says he means law) than authority (imperium): for without it neither household, city, nation, the human race, physical nature nor the universe itself could exist." For a realistic description of the *status quo* of Roman society in the times of Cicero, as well as the detailed treatment of Ciecero's social philosophy and his attitude towards social reform, *cf.,* von Pöhlmann, *op. cit.* Vol. 2, especially 355–450.

[31] . . . *quaecunque ex usu reipublicae majestateque divinarum humanarum publicarum privatarum rerum esse censebit. Cf.,* Steinwenter, *loc. cit.* 90.

[32] The reference to *utilitas publica* as a governmental slogan increased particularly during the Dominate from Diocletian to Constantine concurrently with its use as an inscription on the imperial coins. A few examples: C. Th. 1, 15, 6 (372): *censura pro neglectu utilitatis publicae; ibid.* 371: *utilitatem publicam privatis studiis et patrociniis postponere;* C. J. 12, 62, 3 and Nov. Th. 5, 3 (441) *utilitas publica praeferenda est privatorum contractibus;* C. Th. 15, 1, 50: *ut privata juste neglegeretur paulisper utilitas.* Cited in Steinwenter, *loc. cit.,* 94 *et seq.*

At this conjuncture, the bases of the third source of Western legal culture, the common law, were being built. Although centuries younger than its antique counterparts, of which it bears the undeniable imprints, the common law became in importance, spread, and influence their serious rival. The Island on which it came to life was not widely sundered from the Continent, but its inhabitants, by no means insensitive to any shift of power or any change of faith on the mainland, gave to every practice and every doctrine that came from abroad its peculiar turn or imprint.[33] Nowhere is this more obvious than in law. Formulated in a language that was neither quite Latin nor quite German,[34] England shaped by its own peculiar twist Saxon, Scandinavian, and Germanic custom, Roman jurisprudence, and Norman practices of administration into the working rules of a common law. English legal memory begins late[35] as compared with the Roman;—Glanvill's *Tractatus* appeared in the very years when Irnerius began to write his *glossae* on the margins of the renascent Roman law in Bologna—this treatise, however, is a fairly precise restatement of the already elaborate rules of the administration of justice as enforced by the royal officials of Henry II. Although younger in years, different in character, and remote in space from Rome, the basic lines of development are strikingly similar.[36] These have as frequently been pointed out as have the differences been emphasized—and in the long run neither do matter. In the coherence of Western history, of which the history of the Island was an integral part, the basic issue on either side of the Channel has always been the same: the struggle for the rule of law. In this struggle, however, the common law was more successful than its continental counterpart. Emerging from a feudal structure[37] through which power was distributed along an intricate network of status determined by

[33] Winston S. Churchill, 1 A History of the English Speaking Peoples (1956) viii.

[34] *Id. ibid.*, ix.

[35] F. W. Maitland, "Why the History of the English Law is not Written," 1 Collected Papers, reprinted in the Maitland Reader, ed. V. T. H. Delany, Docket Series. (New York, 1957).

[36] To cite merely the most conspicuous features: early secularization and centralization of the administration of justice by selected laymen; the development of substantive rights through forms of action; the collateral evolution of law and equity; equal distrust of legislation—shown, for instance, in the common-law courts' attitude towards such "marvellous monuments of legislative futulity" as the Statute of Uses and the Statute of Frauds; equal contempt for theory, overcome at times, however, in the common law by such an upsurge in the demand that it produced "a somewhat injurious effect on the supply." *Cf.*, F. W. Maitland, 1 Collected Works, 2; *id.* "The Law of Real Property," in The Maitland Reader, 46; for detailed treatments, *cf.*, W. W. Buckland-A. D. McNair, Roman Law and Common Law, 2nd ed. revised by F. H. Lawson (1952); C. K. Allen, Law in the Making, (5th ed. 1951) 154 *et seq.*; Hessel E. Yntema, "Roman Law and its Influence on Western Civilization," 35 Cornell Law Quarterly (1949) 78 *et seq.*

[37] F. Pollock-F. W. Maitland, The History of the English Law before the Time of Edward I (2nd ed. 1952); Max Radin, Anglo-American Legal History (1936); *op. cit.* chs. III, IV; C. K. Allen, The Queen's Peace (1953); F. H. Lawson, The Rational Strength of English Law (1951).

property, a status that extended even to the administration of justice, and was carried by a no less intricate network of duties and obligations owed by and to every member of society, the King not excluded, the common law avoided the dangers to which the Roman system was far from immune: concentration of power and authoritarian codification. The very struggles on the Continent which in their actual and spiritual influence transgressed the Channel were given through the common law their particular British turn of social compromise and collective legal guarantee by transposing these battles for political power into contests for legal supremacy. Thus, from the early Middle Ages down to the American Revolution, the successive contests between Church and King and between King and Parliament involved the legal supremacy of their respective courts, ecclesiastical, chancery, or common law. From these issues, the common law emerged always victorious. It subjected to its rule first the divine rights of kings after a revolution by arms, and later the divine rights of capital after a revolution by consent. The tangible guarantees of this rule were always collectively secured and signed documents endowed with the force of constitutions: the Magna Charta signed by the representatives of the barons; the Petition of Right signed by the representatives of the Lords Spiritual and Temporal and the Commons;[38] the Declaration of Independence and the United States Constitution signed by the representatives of the people.

The above are, of course, the broad and rather dramatic outlines, but it was within their limits that the concept of public welfare, as interpreted in this paper, from the standpoint of the acceptance of society of the state's interference with individual rights, developed. A closer examination, however, of the single details which fill up the outline points to a strange contrast in the common law between the personal freedom of the individual and the stringent restrictions on his property rights as well as the rudimentary status of his contractual activities. While personal freedom was guaranteed from its earliest stages by such institutions as due process of law and habeas corpus,[39] freedom of alienation was practically nonexistent within the maze of feudal limitations, and it is characteristic as respects contracts that even in Blackstone contract appears as a mere supplement to the law of property.[40] On the other hand, it would be futile to examine in a feudal legal system the extent of state interference with individual rights. Both, interference and rights, were not determined by power but by status, and status was determined by property. As a result of the transition from status to

[38] 5 Ch. I 1627, Rot. Parl. 1.

[39] W. S. Holdsworth, Some Lessons from our Legal History (1928) 109 *et seq.;* Hessel E. Yntema, "The Crossroads of Justice," 6 Academia Interamericana de Derecho Comparado e Internacional (1957) 111 *et seq.*

[40] Pollock-Maitland, *op. cit.* 185 *et seq.*

contract, property controlled in the initial stages all of the individual's private relations as well as his social duties, while the private law of contracts threatened to swallow up all public law.[41] Hence, for instance, unhampered by the Roman concept of exclusive *dominium*[42] and the Roman stereotyped transactions, the common law fostered the development of the trust by combining the legal and the equitable title in one and the same property—the *dédoublement de propriété,* anathema to civilians—and by omitting the typified provisions of particular contracts, developed a general law of contract based on the individual benefit-detriment requirements of consideration.[43]

Meanwhile, the heritage of antiquity took new life in the medieval successor to the Orbis Romanus, the Ecclesia Romana. It was again through Rome that the world received its law; this time, however, not by the force of arms but by the force of reason.[44] The dreams of Caesar and Claudius were turned into reality by the Church; Roman law was taught at Oxford and Cambridge, while on the Continent, far beyond the forests of Germania, up to the Carpathian range, Roman legal doctrine exerted an influence equal to that of the canon law and the Germanic forms of sodality.[45] To the unity of the Rome of the Caesars corresponded the unity of the Rome of the Popes. This unity, however, was more akin to the Greek world and was not based on law alone: man considered himself part of an articulated Whole that had a final cause of its own; science as professed by man was merely a part of the divinely revealed substratum; and the welfare of his person was subordinated to the welfare of his soul. This mode of thought, however, contained three disruptive elements: first, the common weal concept of the Greek state; second, the Christian concept of man as an end in himself, endowed with qualities and values ineradicably anchored in natural law, and, third, reason as the constitutive element of positive law.[46] To these ancient-modern precepts the medieval element of corpo-

[41] H. S. Maine, Ancient Law (1912, 10th ed.) 172 *et seq.;* Pollock-Maitland, 2 *op. cit.* 233, F. H. Lawson, Introduction to the Law of Property (1958), especially 90 *et seq.*

[42] Of the main forms of common law ownership, "tenure" was the name for the personal relationship which fedual control of land required, "seisin" characterized the control itself, and "estate' was the complex of rights which formed the content of control. *Cf.,* Radin, *op. cit.* 361.

[43] In developing, for instance, the equitable rights of the beneficiary under a trust, the chancellor made them as unlike *iura in personam* and as like *iura in rem* as possible, *cf.,* Maitland, "The Unincorporate Body," Selected Essays (1936). With regard to contracts, *cf.,* Buckland-McNair, *op. cit.,* 154, 265 *et seq.;* F. H. Lawson, *op. cit.* 51; Pollock-Maitland, 2 *op. cit.* 185.

[44] Jhering, *op. cit.* 1.

[45] Max Weber, *op. cit.* 172.

[46] Reason as the guiding legal concept has been asserted by the common law in its deliberate balancing of possible means and ends, while no theory is more contrary to this than continental absolutism that held fast to the will of the sovereign as the sole origin of law. *Cf.,* Huntington Cairns, Legal Philosophy from Plato to Hegel (1949) 168 *et seq.,* 204; W. Friedmann, Legal Theory (1953) 56, mentions reasonableness as an important

rations was added. This theory was developed by the legists and publicists in applying the principles of Roman corporation law to the hierarchy of groups which constituted the structure of medieval society.[47] The moment that the idea saw life that these groups were formed by individuals whose consent was a constitutive element of group-adhesion, and whose rights were governed by the supreme law of the commonwealth of the human race, the *respublica generis humani,* the road was open to trends that justified resistance to positive laws if contrary to natural law; to the declaration that the temporal sovereign is not *legibus solutus;* to the expression of and the representation by the majority of the will of the community—in short to ideas fostered by the Reformation and the French Revolution—until they led to the global transformation of the medieval feudal lore into modern popular sovereignty.[48] The doctrinal formulation of these ancient-modern and medieval precepts crystallized in the theory of law of Thomas Aquinas. He was the first thinker since antiquity to bring the common good from the vagueness of a transcendental heaven into the concrete orbit of positive law by grading the field of law into divine or natural, *gentium,* and *civile,* the last proclaimed as the ordinance of reason for the attainment of the common good.[49] The effects of Thomistic theory showed

criterion for what is just in the law of restraint of trade (Nordenfeldt case [1894] A. C. 535), and the criterion of "reasonable man" as the basis of the law of negligence. Also, Otto Gierke, Political Theories of the Middle Age. Trans. with an Introduction by F. W. Maitland (1913) xi *et seq.;* Fr. von der Heydte, Die Geburtsstunde des souveränen Staates (1952) 12, 166–178.

[47] The deepest exposition of this theory is the by now classic *Genossenschaftstheorie* (1887) by Otto Gierke. On the difficulties of translating this expression, *cf.* Maitland's Introduction to *op. cit.* n. 46. The "corporation" theory was of Italian origin, but it swept over Germany like a deluge and stole into English law through the ecclesiastical courts' management of religious corporations. It prepared the way by using, fairly reluctantly at first, the Roman concepts of *persona ficta* and *corpus* for the concept of the English king as "corporation sole" and for the state as the "corporation aggregate of the many." This led in the common law of the Nineteenth century to such a flood that "more corporations were created by the legislature of Illinois at its last session than existed in the whole civilized world at the commencement of the century." *Cf.,* Gierke, *op. cit.* n. 46, at xii; Max Weber, *op. cit.* 182.

[48] Decisive for this trend was the *lex regia* in the Corpus Juris unearthed by the Glossators: D I.4—Inst. 1, 2, 6: *Quod principii placuit legis habet vigorem: utpote cum lege regia quae de imperio eius lata est populus ei et in eum omne suum imperium et potestatem concedat;* Ockham, Dial. III. tr. 2, 1, 2, c.24: the *ius humanum* which introduced lordship and ownership . . . was a *ius populi* and was transferred by the *populus* to the Emperor; Nicolaus Cusanus, De Concordantia Catholica, II, c. 13: all power flows from the free *subiectio inferiorum;* iii. c.4; it arises *per viam voluntariae subiectionis et consensus. Cf.,* Gierke, *op. cit.* n. 46, notes 138, 142, 143.

[49] *Cf.,* Huntington Cairns, *op. cit.* 168 *et seq.* The vagueness of the notion *bonum commune* gave rise ever since the Sixth century to endeavors of definition; naturally it was often identified with the political directive given as *communis utilitas* to the ruling princes, thus, for instance by Abälard, John of Salisbury, Vincent of Beauvais. At times the two are identified and combined with the notion of *salus publica, cf.* von der Heydte, *op. cit.* 187, n. 20. On the comprehensive elaboration of modern viewpoints, *cf.,* Jean Dabin, Doctrine Générale de l'État (1939) 34 *et seq.;* M. de la Bigne de Villeneuve, L'Activité Étatique (1954) ch. l, sect. 2.

up in practice in the weak protection of acquired rights given by positive law, unless title derived from natural law; this applied to rights of property as well as to the binding force of contracts. Consequently, title granted by the state was revocable especially if based on a privilege contrary to natural law, and contracts to which the state and the individual were parties were not open to rescission by the state. These principles were not broken through unless indicated by the interest of the common good.[50]

The impact of these ideas was momentuous and is still felt in our days, while the controversies they initiated are still undecided. These range in varying degrees around two poles of sovereignty, that of the state and that of the individual, both contending over the delimitation of the provinces assigned to them by natural law.[51] In this delimitation, the chief role is that of law, in terms of which both sides have constructed their arguments of opposite interpretation. On the one hand, law is viewed as the means to achieve social ends desired by the majority, ends dependent on intrinsic factors that reach from habit to expressed ideals; on the other, law is deemed an arbitrary set of promulgated rules of conduct by which all social ends—desired or not—are supposedly realized.[52]

III

The foregoing section drew the brief—indeed very brief—outline of the basic trends that have led to our present concepts of public welfare, of ownership, and contract. Their treatment seemed nevertheless inevitable because they were carried forth by ideas which form an unbroken chain to the fundamental problem of the postwar Western world: the extent to which our society should accept the rules of law that impose such limitations on our inherited concepts of individual freedom, individual ownership, and contractual autonomy as are conditioned by the emerging demands of current public welfare ideology. It must be pointed out, however, that the following examination is limited in two respects. First, it is restricted to a few countries, in which, however, the

[50] Gierke, *op. cit.* n. 46, 80 *et seq.*, notes 273–81; Ockham, Dial. iii. tr. 2, 1.2, c. 23–5, mentions as an excuse for expropriation *"ex causa et pro communi utilitate;"* Aen. Sylv., De ortu et auctoritate imperii Romani, c.15, holds that privileges may be abolished if they are *"reipublicae damnosa;"* "Dante Alighieri, De monarchia libri tres, iii, c.7, "Emperor or Pope, like God, is powerless in one point, *"quod sibi similem creare non potest: auctoritas principalis non est principiis nisi ad usum, quia nullus princeps seipsum autorizare potest."* Thomas Aquinas, Summa Theologiae, ii, 2 q. 58 ff., limits the rights of individuals in accordance with the precepts of *iustitia generalis s. legalis,* if necessitated by the *bonum commune.* That these ideas are far from obsolete is proved by current discussions on nationalization, *cf.,* Ignaz Seidl-Hohenveldern, "Communist Theories on Confiscation and Expropriation," 7 American Journal of Comparative Law (1958) 541, especially at 547–48.

[51] Gierke, *op. cit.,* 100.

[52] Huntington Cairns, *op. cit.,* 204.

developments characterize those of the entire Western world; second, it does not treat the development in those countries in which neither the acceptance of society is deductible from freely voiced controversies, nor are the decisions of the courts rendered in that atmosphere of traditions which characterize the rule of law.

The problem presented by these developments is of great current interest. The first legal conference held in Europe after the second world war chose as its leading topics the influence of public law over private law, the rights of the individual, and the evolution of the law of property;[53] the first issue of the revived French *Archives de Philosophie du Droit* is dedicated to the "particularly acute problem" of the distinction between private law and public law and to the public enterprise;[54] the first comparative legal symposium to the analysis of the public corporation;[55] while the first comparative law conference ever held in the United States, in 1957, devoted a series of discussions to the rule of law,[56] and these evoked such interest that they were continued at the next conference of comparative law in the summer of 1958, in Brussels, and in subsequent conferences at Warsaw and New Delhi.

The current discussions evidence, in the first place, an amazing uniformity in the formulation of the central problem: the quest for satisfactory legal safeguards by which the traditional rights and liberties of the individual may be upheld against the gradual encroachment on these very rights necessitated by the social conditions of the welfare state. Or, in other words, the satisfactory integration of private with public welfare. Second, comparison reveals the same unanimity in the formulation of two more specialized problems: the changes in the two basic legal institutions of ownership and contract. In the following these will be examined in turn.

At the outset, two conspicuous changes must be noted which led eventually to the present concept of public welfare. The first is the change in the dominant notion, the second a change in the dominant attitude. In every age man selects a fiction by which he lives. In the recent past, this fiction was the unlimited power of the individual over his property and his actions, restricted only by the equally unlimited power of his fellow beings. When this fiction began to wane under the

[53] Travaux de l'Association Henri Capitant (hereinafter Travaux) Paris, 1947. Journées de Droit Civil Franco-Suisses, Juin 1946, at pp. 99 *et seq.*

[54] Archives de Philosophie du Droit, N.S. (Paris, 1952), Preface by Paul Roubier.

[55] The Public Corporation. A Comparative Symposium. (W. Friedmann, ed.) Toronto, 1954.

[56] Fourth International Conference of Comparative Law, University of Chicago, September 1957 (hereinafter Chicago Conference). The problem of upholding the rule of law within a planned society is, naturally, not restricted to the Western orbit, it faces every country that feels the need for large-scale economic and industrial expansion. *Cf.*, for instance, the recent article by the Chief Justice of the Patna High Court in India, V. Ramaswamy, "Rule of Law and a Planned Society," 1 Journal of the Indian Law Institute (1958) 31 *et seq.*

impact of unlimited technological advance since the turn of this century, and exploded finally in its hypertrophy that unleashed the tragic events of the second world war, a new fiction had to be found. Thus, instead of "power" attributed to the individual, the "social" fiction emerged, together with its varied qualifications, like "social purpose," "social value," "social law," and "social justice," enriching current vocabulary by a number of well-sounding tautologies for concepts all of which are by their nature social. Values are always relative and hence social. What are the aims in society, if not social? Law as the regulatory force of society cannot be anything but social, and justice, the collectively felt and expressed need of any society cannot be qualified—and woe to that society in which it is![57] It has been convincingly pointed out recently[58] that in practice, emphasis on "social" tends merely to oppose it to "individual" and therefore makes the integration of individual interests within the framework of public interests more difficult than it should be, because measures enacted in the interest of the public, benefit in the long run also the interests of the individual. If the problem is reduced to one of legal method, the solution is automatically given by the choice of deductive or teleological reasoning: if the ends are not opposed, either the given principle of public welfare, or the concrete solution of single individual interests will converge in the results. The individual interest, for example, in avoiding the nullity of a contract might either be a derivative of or an aim towards the security of transactions, which, in turn, derives from or leads to the security of commerce. And this, in itself, is an abstract notion of public interest.[59]

This change in fictions is also determined by the change in the dominant social attitude, and both are determined by the change in social and economic conditions which have basically altered the individual's attitude towards the state. The liberal state of *laissez faire* capitalism of 1885, the date when Dicey formulated his classic postulates on the rule of law,[60] accorded well with the fiction of the auton-

[57] In Pascal's time justice was merely 'lovely,' and differed only *au deçà et au delà* of the Pyrenees. His thoughts, however, would be given new food by such modern qualifications as "progressive," bourgeois," "socialist," or the most striking of all, "of the people."

[58] Henri Batiffol, Aspects philosophiques du droit international privé, Paris, 1956.

[59] *Id., ibid.,* 221 *et seq.*

[60] A. V. Dicey, The Law of the Constitution. However, Dicey himself admitted in the Introduction to the second edition of his Law and Public Opinion in England, in 1914, that the *laissez faire* attitude was being slowly eclipsed by the growing trend of collectivism, and the currents and counter-currents of public opinion had inspired such legislation as the Old Age Pensions Act, 1908, the National Insurance Act, 1911, the Trade Union Act, 1913, the Acts Fixing a Minimum Rate of Wages, and the Coal Mines Regulation Act, 1908. Whatever the defects of Dicey's concept of rule of law, (*cf.,* a comprehensive criticism in W. Friedmann, Law and Social Change in Contemporary Britain, 1951 (hereinafter Law and Social Change) at 285 *et seq.*), its basic merits are ineradicable from contemporary public opinion, and it was under the influence of his formulation that in 1929, in England, the Committee on Ministers' Powers was set up

omous individual punishable only for a distinct breach of law by the ordinary courts of the land and equally subject to the law of the land as declared by the ordinary courts; his individual rights deriving from centuries of judicial precedents and not from categories enumerated in codes of fairly recent vintage. But the state described by Dicey was altogether different from the state of our days, however sincere its endeavors to maintain this same rule of law.[61] The state today is no more a mere source of permissive legislation with the sole functions of a night-watchman. It has become a dispenser of public benefits, and the individual's freedom *from* the state has become surbordinated to his claims *on* the state.[62] These claims now cover practically every aspect of his life: family allowances, medical care, housing, unemployment, retirement, and death benefits, etc., each bringing new state functions of administration into being in addition to the equally new state functions connected with government ownership and government operation of industries and businesses.[63]

This change in attitude has been attended by changes in the law. New rights have been created to fit new conditions which, in their rapid growth, vest in relations of fact the force formerly conferred only by law.[64] The increase in state functions necessitates an as yet unknown degree of parliamentary delegation and legislation by decree, as is the case in England and France, to endow the newly created

to ". . . consider the powers exercised . . . by way of (a) delegated legislation, and (b) judicial or quasi-judicial decision . . . ," even if, as stated the Committee "started life with the dead hand of Dicey lying frozen on its neck." (W. A. Robson, Justice and Administrative Law), London, 1947 (2nd ed.) at pp. 318. For a survey of Dicey's rule of law on the continent, *cf.*, René Victor, "La notion de la légalité en Belgique," 35 Revue de Droit International et de Droit Comparé (1958) Nos. 2–3, Rapports des Juristes Belges, V^e^ Congrès International de Droit Comparé, Bruxelles, Août, 1958, pp. 493 *et seq.*

[61] Sir Alfred Denning, The Changing Law, London, 1953, ch. 1: Adams v. Naylor [1946] A. C. 543; Doyster v. Cavey [1947] K. B. 204, decided under the Crown Proceedings Act, 1947, that did away with the old administrative fiat of "let right be done," and placed Government Departments under law. For an elaborate discussion, *cf.*, W. Friedmann, Law and Social Change, chs. 12, 13.

[62] Nils Herlitz, "The Critical Points of the Rule of Law as Understood in the Northern Countries," report presented to the Chicago Conference.

[63] Harry W. Jones, "The Rule of Law and the Welfare State," 58 Columbia Law Review (1958) 143 *et seq.;* Hans Herold, "Das absolute Eigentum und sein Zerfall," Schweizerische Beiträge zum Fünften internationalen Kongress für Rechtsvergleichung, Brüssel, 1958, (hereinafter Brussels Conference) pp. 19 *et seq.*, at 31, *Der Staat lenkt, gibt und nimmt;* W. Friedmann, Law and Social Change, pp. 298 *et seq.; id.*, Legal Theory, London, 1953 (3rd ed.) at 344 *et seq.*

[64] R. Savatier, Les métamorphoses économiques et sociales du droit civil d'aujourd'hui, Paris, 1952 (2nd ed.) at 25: the actual relation of labor substitutes for the contract of labor; actual occupation for contracts of lease; the free union (*union libre*) of the parties for legal marriage. This last is comparable to the common law marriage, in France described as *l'hypothèse concubine; cf.*, Barna Horvath, "Rights of Man, Due Process of Law and *Excès de Pouvoir,*" 4 American Journal of Comparative Law (1955) 539, at 568; also Mario Ricca-Barberis, Portieri, concubine e commercianti profittatori, Torino, 1956.

administrative agencies and government departments with powers hitherto reserved only to Parliament.[65] Furthermore, the transfer of autonomy and responsibility from the individual to the collective sphere, and the creation of new means for the acquisition and management of new riches have transformed not only the substance of fundamental legal institutions but also the character of the legal system as a whole. This transformation is referred to as the "publicization," the "socialization," and finally, the "proletarization" of law, terms denoting the metamorphosis of rights and duties from private to public, from individual to collective, and of law from "bourgeois" to that of "the masses."[66]

In substance, this metamorphosis appears uniform throughout the Western world, although the problems are variously projected in the various countries. Thus, in France and in Switzerland, the critical problem is that of the increasing domination of public over private law;[67] in England, the menace of administrative autocracy;[68] in Germany, the tensions produced by the efforts to co-ordinate the old principles of the *Rechtsstaat* of the Weimar Constitution with the new *Sozialstaatsklau-*

[65] C. K. Allen, Law and Orders, London, 1956 (2nd ed.) especially chapters 4–8, and Dr. Allen's delightful caricature in Law and Disorders, London, 1946 (making the citizen's right to breathe dependent on the policeman's delegated powers). In France, the delegation of powers depends on constitutional interpretation: whether the powers delegated by the ad hoc *lois d'habilitation* are legally vested in the legislature. These laws, however, have been voted with extreme caution ever since their abuse by the Laval Government in 1935. *Cf.,* J. Laferrière, "La législation déléguée en Angleterre et le contrôle de son exercice par le Parlement," in L'Évolution du Droit Public, Études en l'Honneur d'Achille Mestre, Paris, 1956, pp. 331, at 334, 335, 352 *et seq.* In Germany, delegation of power by enabling legislation is authorized by Article 80, Section 1 of the Bonn Constitution, with the proviso that the extent and limits of the delegation be strictly determined by the enabling statute. This limitation is rigorously enforced by the Federal Constitutional Court, BVerfGE 1:14, 60; 2:307, 334; 4:7, 21; 5:71, 76. *Cf.,* Hans Rupp, "Government under Law in Germany," report presented to the Chicago Conference.

[66] R. Savatier, *op. cit.* n. 64, ch. 14. Mention should be made here of a nonlegal work of spectacular success, first published in 1926, Ortega y Gasset, La Rebelión de las Masas, since translated into practically all languages.

[67] R. Savatier, Du droit civil au droit public, Paris, 1950 (2nd ed.); M. Flour, "L'influence du droit public sur le droit privé"; *id.,* "L'influence du droit public sur le droit privé en France," Travaux, pp. 39 *et seq.,* 184 *et seq.; ibid.,* M. Pioget, "L'influence du droit public sur le droit privé en Suisse," pp. 199 *et seq.;* M. Rivero, "Droit public et droit privé. Conquête ou status quo?" D. H. 1947, Chronique, 69. But H. Mazeaud holds, "Défense du droit privé," D. H. 1946, Chronique 17, that the structure of public law is basically modelled upon the structure of private law, especially on the imperative provisions of the latter.

[68] C. K. Allen, *op. cit.* n. 65; Lord MacDermott, Protection from Power Under English Law, London, 1957, ch. 3; W. Friedmann, Law and Social Change, at 163 *et seq.,* Roberts v. Hopwood [1925] A. C. 578; Re Decision of Walker [1944] 1 K. B. 644; Middlesex County Council v. Miller [1948] 1 K. B. 438; Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K. B. 223; Blackpool Corporation v. Locker [1948] 1 K. B. 349, analyzing the conflicting approach of English courts to the judicial supervision of administrative discretion.

seln of the *Bonner Grundgesetz*;[69] while in the United States, where the emergence of the welfare state touches, as has been always the case in its history in times of legal change, on the acute constitutional problems of due process,[70] state versus federal rights,[71] and separation of

[69] Ernst Forsthoff, "The Dualism of the Rule of Law and the Welfare State (*Sozialstaat*) in the Constitutional Law of the Federal Republic of Germany," report presented to the Chicago Conference; *ibid.*, the Constitution of Bavaria of December 2, 1946. . . . "Bavaria is a state incorporating the rule of law, a cultural state, and a welfare state (*Sozialstaat*). It serves the common weal." *ibid.*, the leading decision of the Federal Labor Court, Vol. I, 193, deciding the issue whether it is compatible with the equality clause of the Constitution to award female workers a paid "household day" thus discriminating against male workers. On the Constitutional Court's interpretation of the notions *"sozialer Rechtsstaat"* and *"verfassungsmässige Ordnung,"* expressed in Article 28, Section 1 of the *Bonner Grundgesetz, cf.*, BVerfGE 3:377, 381 4:96, 102; 5:85, 198, in Rupp, *loc. cit. supra* n. 65; BVerfGE 2:1, decision on the unconstitutionality of the German *Sozialistische Reichspartei* (SRP) of October 23, 1952, in Hans Peters, "Entwicklungstendenzen der Demokratie in Deutschland seit 1949," in Demokratie und Rechtsstaat, Festgabe zum 60. Geburtstag von Zaccaria Giacometti, Zürich, 1953, 229 at 234; *ibid.*, Hans Nef, "Die Fortbildung der schweizerischen Demokratie," 203 *et seq.*, especially his discussion on "discrimination" in Switzerland against women by not granting them political rights. (As a matter of fact, according to the last referendum, Swiss women unanimously forego these rights.)

[70] ". . . Since a high value was put on men's right to be let alone—to be 'private'—there must be a reasonable public interest to justify imposing public force on individuals' activities. This is the substance of what in the United States we eventually called 'due process of law.' . . ." James Willard Hurst, Law and the Conditions of Freedom in Nineteenth Century United States, Madison, 1956, at 8. For a comparison of this same reasonable public interest that justifies impositions on the individual in the civil law system, *cf.*, Barna Horvath, "Rights of Man, Due Process of Law and *Excès de Pouvoir*," *loc. cit. supra* n. 64, at 567 *et seq.*; Conseil d'État, Lesbats, February 25, 1864; Fédération nationale des syndicats des grossistes, July 29, 1950; Société immobilière marseillaise, April 9, 1948; Époux Grange, July 30, 1949, analysing *détournement du pouvoir* in the public interest.

[71] It was within this constitutional context that the main social and economic trends eventually found their legal vindication through the decisions of the Supreme Court. The initial invalidations of state legislation on grounds of unreasonable interference with the vested property rights of the *beati possidentes* and the abuses within the contracts clause gave way to the Court's deference to legislative determination of what is wise economic policy, Nebbia v. New York, 291 U.S. 502 (1934); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949), *cf.*, Paul G. Kauper, "Rule of Law in the United States," report presented at the Chicago Conference; *id.*, Frontiers of Constitutional Liberty, Ann Arbor, 1956, especially ch. 1. From the perspective of 150 years, the age of the French Code Civil, these decisions evince the evolution, within the traditional conservatism of law, of the checks on the abuse of rights embedded in the constitutional guarantees of individual freedom under the pressure of public welfare: Dartmouth College v. Woodward, 4 Wheaton 518 (1819); Charles River Bridge v. Warren Bridge, 11 Peters 420 (1837); Munn v. Illinois, 94 U.S. 113 (1877); Lochner v. New York, 198 U.S. 45 (1905) where Justice Holmes' dissent had farther reaching effects than the majority opinion; Adkins v. Children's Hospital, 261 U.S. 525 (1923); Hammer v. Dagenhart, 247 U.S. 251 (1918) overruled as late as 1941 in United States v. Darby, 312 U.S. 100 (1941); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). *Cf.*, James Willard Hurst, *op. cit supra* n. 70; Carl Brent Swisher, The Supreme Court in Modern Role, New York, 1958; *id.*, Historic Decisions of the Supreme Court, Princeton, 1958; Ch. Grove Haines and Foster H. Sherwood, The Role of the Supreme Court in American Government and Politics 1835–1864, Berkeley, 1957.

powers,[72] attention is focused on the restraint and judicial review of administrative action and, with perhaps the greatest concern shown in the Western orbit, on such limitations of individual freedom as seem to transcend the responsibilities of the welfare state even in its double capacity as protector of the people and dispenser of public benefits.[73]

The reaction to these developments is mixed. It ranges from dark pessimism presaging the fall of Western society,[74] the decline of law,[75] the passing of Parliament,[76] and the rise of a new despotism,[77] to realistic acknowledgment of the fact that the welfare state is here to stay and that is success will ultimately depend on the adaptation of the old and proven legal safeguards for individual rights to the new conditions. This acknowledgment is evident in the moves for reform of administrative law and procedure, based characteristically on the old safeguards at law of *audi alteram partem,* publicity, and independent review within a hierarchy of administrative tribunals, whose decisions should ultimately be subject to judicial review.[78] The results so far of this process

[72] Which developed fairly soon into judicial supremacy; Youngstown Co. v. Sawyer, 343 U.S. 579 (1952), the famous Steel Seizure case in which the Supreme Court invalidated the President's powers to take over and operate the industry during the Korean war. On the other hand, Andrew Jackson's "let John Marshall enforce the law," after McCulloch v. Maryland (4 Wheat. 316 (1819) reverberated as a queer echo in Little Rock, Arkansas, after Brown v. Board of Education 347 U.S. 483 (1954) and Cooper v. Aaron, 358 U.S. 1 (1958). *Cf.,* Reginald Parker, "The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy," 12 Rutgers Law Review (1957–58) 449; Bernard Schwartz, "The Supreme Court—October 1957 Term," 57 Michigan L. R. (1959) 315.

[73] Wong Yang Sung v. McGrath, 339 U.S. 908 (1950), fair hearing under the provisions of the Federal Administrative Procedure Act, 1946; Thomas v. Collins, 323 U.S. 516 (1945), justified close judicial scrutiny of legislation impinging on the basic freedoms of speech, press, assembly, and religion; Bauer v. Acheson, 106 F. Supp. 445 (1952); United States v. Rumley, 345 U.S. 41 (1953); Peters v. Hobby, 349 U.S. 331 (1955), on the timely questions of public employee's right to be free from discharge on arbitrary grounds, and the right to hearing in cases when the issuance of a passport is denied; *cf.,* Paul G. Kauper, *loc. cit. supra* n. 71; also, Walter Gellhorn, Individual Freedom and Governmental Restraints, Baton Rouge, 1956, especially ch. 1, discussing security, loyalty, and deportation decisions; Milton R. Konvitz, Bill of Rights Reader, Ithaca, 1954.

[74] The success of two works, nonlegal, each published before the outbreak of the two wars proves the interest of the public in the topic and its receptivity for their inherent pessimism: Oswald Spengler, Der Untergang des Abendlandes, 1911; Wilhelm Röpke, Die Gesellschaftskrisis der Gegenwart, Zürich, 1938.

[75] G. Ripert, Le déclin du droit, Paris, 1949; *id.,* La règle morale dans les obligations civiles, Paris, 19; *id.,* Le régime démocratique et le droit civil moderne, Paris, 1948; Hans Huber, "Niedergang des Rechts und die Krise des Rechtsstaates," Festschrift für Zaccaria Giacometti, *supra* n. 69; Roscoe Pound, The Crisis in American Law, 1925; *id.,* Report, American Bar Association, Special Committee on Administrative Law, 1938; Friedrich A. Hayek, The Road to Serfdom, London, 1944.

[76] G. W. Keeton, The Passing of Parliament, London, 1954 (2nd ed.).

[77] Lord Hewart of Bury, The New Despotism, 1929.

[78] This move was restricted to the United States before the Administrative Procedure Act, 1946, and more particularly to England, where there is no special branch of *droit administratif* along the lines of the jurisdiction of the Conseil d'Etat and the Bundesverfassungsgerichtshof. *Cf.,* W. A. Robson, Justice and Administrative Law, London,

should quiet the apprehensions envisaging the eventual domination of public law, because the general trend is to subject public authorities to the same duties as private individuals and to treat the promises of the executive as contractual rather than administrative,[79] on the principle succinctly expressed by the French, *qu'elle agisse, mais qu'elle paie.*[80] Viewed from whatever angle, however, one aspect stands clear: the consolidation of the welfare state has lifted individual rights from the sphere of exclusive autonomy into the sphere of qualified collectivism in which the adjudication of these rights has shifted the emphasis from their individual value to their social consequences.[81]

The concrete changes in the institutions of property and contract are as much due to the influence of public welfare ideology as they are the actual consequences of the radical turn in social and economic conditions. This interplay of form and substance has produced a new variation on the old theme: the revolution of substance beneath the mere expansion of form. To be sure, the formal changes are not insubstantial,

1947 (2nd ed.) at xii, xvii, 437–39, 495, 541–47, 636–9; D. Hewitt, The Control of Delegated Legislation, London, 1953; C. K. Allen, Administrative Jurisdiction, London, 1956.

[79] Smith v. River Douglas Catchment Board [1949] 2 K. B. 456; Robertson v. Minister of Pensions [1949] 1. K. B. 227; Tuberville v. West Ham Corporation [1950] 2 K. B. 203; *cf.*, W. Friedmann, Law and Social Change, ch. 8, Public Law Problems in Recent English Decisions, at 185 *et seq.*, with comparative analysis.

[80] Henry Puget, "Tradition et Progrès au Sein du Conseil d'État," in Le Conseil d'État-Livre Jubilaire, Paris, 1952, 109 *et seq.*, at 125. This applies also to public officers, even to the President of the French Republic, as decided by the Conseil in an *avis consultatif*, of February 5, 1948, subjecting the salary of the President to the withholdings of social security. The then President, M. Vincent-Auriol, in his *souriante et fine bonhomie* has certainly appreciated this decision as the token of national solidarity for which he has always fought. *Cf., ibid.*, René Martin, "Le Rôle Consultatif du Conseil d'État en Matière Économique," 415 *et seq.*, at 429.

[81] W. Friedmann, Law and Social Change, 183 *et seq.*; *id.*, Legal Theory, ch. 31, Legal Values in Modern Democracy. Professor Keeton's example, *op. cit. supra*, n. 6, is particularly instructive. The old woman's property right in the house and lot from which she was evicted (presumably after being offered compensation that she did not accept) should certainly be subordinated to the public interest in housing several families on this same lot, who, again presumably, are confined to slum quarters. For the predominance of public as against individual interests in recent French decisions, *cf.*, M. Letourneur and R. Drago, "The Rule of Law as Understood in France," 7 American Journal of Comparative Law (1958) 147 *et seq.*: inroads by public collectivities on the liberty of commerce and industry, C. E. June 17, 1956, *Siméon*, Act. Jur. 1956. II. 89; creation of vacation colonies, *Naliato*, January 22, 1955, R. D. P. 1955, 716, note Waline; the breaking through in the common interest of the strict rule of the equality in the enjoyment of public services, *Gughelheim*, R. D. P. 1939, 509, concl. Latournerie; *Odilon Platon*, March 15, 1946, Rec. p. 79; different rates of taxation, *Syndicat de la Raffinerie de soufre française*, June 29, 1951, Rec. p. 377. Moreover, in its decision in the *Monpeurt* case, July 31, 1942, Dalloz, Recueil critique, 1942, p. 138, conclusions Commissaire du gouvernement Ségalat, at 140, the Conseil d'État extended to an unprecedented degree the sphere of application of administrative law in the interest of public welfare by vesting in professional organizations powers of public authority to the extent of granting against their regulations and dispositions the usual actions for legal redress. *Cf.*, Charles Eisenmann, "L'arrêt Monpeurt: Légende et réalité," in L'Évolution du droit public, *op. cit.* n. 65 *supra*, Pp. 221 *et seq.*

but they have in the main only affected the size, the forms, and the means of acquisition of property. They have promoted the growth of productive capital and its concentration in huge corporations, private or public; introduced new methods of acquiring riches, successfully exploited in spite of the instability of vested property rights and the frequent depreciation of money, none of which, however, has made wealth by man less desired;[82] reduced and at the same time mobilized the old tangible evidences of property to slips of paper called stocks, bonds, and securities;[83] or dematerialized them altogether into industrial, literary, artistic, and scientific property. However, this process of growth and multiplication is by no means unique. Was the opening of overseas markets during the Renaissance less revolutionary than is the opening of outer space today? The real revolution occurred in substance. It occurred through the clash of the old and new fictions by which the former power of the owner has been dissolved into its component functions, control, use,[84] and abuse, and the emphasis from the power of control and use shifted to the socially controlled prevention of abuse.[85] This dissolution of power reversed at the same time the functions of ownership: those who own do not control, and those who control do not own.[86]

Two masterful treatises illustrate this process in its initial and its advanced stage. Both treat property in its contemporary social functions, but while the first[87] envisages it from the all-determinative standpoint

[82] R. Savatier, *op. cit.* n. 64, at 291.

[83] Adolf A. Berle and Gardiner C. Means, The Modern Corporation and Private Property, New York, 1933, at 7.

[84] *Ibid.*, Book I, ch. 1; Book IV, ch. 1.; also Hans Peter, "Wandlungen der Eigentumsordung und der Eigentumslehre seit dem 19. Jahrhundert," Zürcher Beiträge zur Rechtswissenschaft (1949) discussing in particular Duguit's theory of the social function of property.

[85] M. Flour, *loc. cit. supra* n. 67; *ibid.*, Léon Lyon-Caen, Discussion on the development of *abus de droit* by the French courts, pp. 147 *et seq.; ibid.*, M. Pioget, on restrictions on abuse by Swiss legislation, pp. 208 *et seq.*, citing the laws of December 10, 1941, invalidating certain means of security; December 12, 1940, prohibitions on alienation for a certain period of agricultural immovables; July 1, 1937, requiring a minimum amount of capital for corporations; *ibid.*, M. Aeby, "Sur l'évolution de droit de propriété en Suisse," citing the early Swiss nationalization laws as means of prevention of the abusive use of rights; the creation of the Swiss Banque nationale, 1905; the same year the nationalization of railroads; in 1912, the law on compulsory workmen's compensation; nationalization of the mining and electrical industries; while in a report (of 1946) it has been shown that 70% of the hydraulic industry is nationalized. Prevention of abuse in the interest of the public is the reason for legislation regulating the non-use of patents, *cf.*, Nicholas A. Vonneuman, "Conditionally Exclusive Patent Rights and the Patent Clause of the Constitution," 5 American Journal of Comparative Law (1956) 391 *et seq.;* restraints on trade and commerce, *cf.* W. Friedmann, Legal Theory 487 *et seq.*, discussing United States and British antitrust policy; *id.*, Law and Social Change, ch. 6, Freedom of Trade, Public Policy and the Courts.

[86] Berle and Means, *op. cit. supra* n. 83, pp. 355 *et seq.*

[87] Karl Renner, The Institutions of Private Law and their Social Functions, London, 1949. Edited, with an Introduction and notes by O. Kahn-Freund. In the statement of the learned editor, the author was well aware of the profound transformations in the

of the social understructure, the second[88] lifts it into the sphere of control of public welfare. And it is at this juncture that public welfare, through the concrete working of a legal institution is brought from the conceptual heaven down to the reality of life. The most obvious manifestation of property today is in its corporate form, public, quasi-public, or private,[89] which has become both a method of property tenure and a means of organizing economic life.[90] By the very magnitude of corporations the functions of property as well as its inherent impetus of production affect every stratum of society, the members of which become producers and at the same time recipients of its achievements. Thus, the growth in size, in the latitude of its effects, and in the number of active participants, precludes the control and use of property in the interest of one single group. Whether these groups represent passive owners, active managers,[91] or the largest group of all, the aggregate of productive workers, none of these may claim that the functions of property be exercised in their sole interest.[92] Reinvestment of profits, exploration of markets for purchase or sale, stabilization of business, service to the public, all these measures transcend the limits of single group interests and hence are not able to withstand in the long run the pressure brought by considerations of public welfare.

However, the wide radius of the functions and effects of property transcends also the limits of its special field and enters that of contract. Measures for fair wages, group insurance, workmen's compensation, collective labor agreements, although connected with the control and use of property, primarily pertain to the category of contractual obligations. Similarly to the explosion of the old myth of property as power, we witness now the explosion of another myth: that of the autonomous will of the individual. The process is the same: in the field of prop-

world of norms even in the relatively short span between the first and second editions of his book, 1904–1929 (p. 37). Similarly, the transformations between the second edition and the English version, between 1929–1949, were so notable that the annotations occupy almost as much space as the original text.

[88] A. A. Berle and G. C. Means, *op. cit.* n. 83 *supra.*

[89] A few names will be self-explanatory: General Motors, General Electric, United States Steel, Ford, Caltex, Standard Oil, American Telephone and Telegraph Corp., in the United States; Montecatini in Italy; Ciba in Switzerland; Alfried Krupp in Germany; Compagnie Générale Transatlantique et Messagérie maritimes, Compagnie Nationale "Air France," in France, etc. The differentiating factor in these corporations is the extent of state control and state holdings that gives them public or private character; the assimilating factor is their social and economic purpose, ". . . operating a service of economic or social character . . . as an independent legal entity; largely autonomous in its management, though responsible to the public . . ." *Cf.,* The Public Corporation. A Comparative Symposium, *op. cit.* n. 55, *supra,* at 543. For an assessment of the social and legal impacts of organized groups, notably of the American foundation, *cf.,* W. G. Friedmann, "Corporate Power, Government by Private Groups, and the Law," 57 Columbia Law Review (1957) 155.

[90] Berle and Means, *op. cit.* at 1.

[91] *Ibid.,* at 355.

[92] *Ibid.,* at 356.

erty, the control and use of individual power has been lifted into the collective sphere of the prevention of abuse; in the field of contract, the will of the individual is lifted from its autonomous sphere into the collective expression of consent, and the old contract of individual autonomy is more and more replaced by the new contract of adhesion.[93] On the surface, this process seems to eliminate the cherished qualities of individual freedom, but did the parties in this respect always possess equal freedom to express their will and to incorporate it in stipulations for their equal benefit? The determinative standpoint of the past was the force of economic pressure; now it is the force of the social purposes involved. The sorcerer's apprentice can no longer master all alone the forces that he conjured: the power plant, the atomic reactor, and the guided missile are beyond his autonomous will to control and beyond his exclusive capacity to enjoy. The loss of his freedom, however, is no worse than is the loss of the freedom of those who sign the compulsory provisions of standardized contracts[94] by which they become parties to as well as the beneficiaries of stipulations for transportation on land, by sea, and the air, for services of gas, telephone, and electricity, parties to and beneficiaries of mortgage, loan, insurance, and security agreements, collective labor contracts, and social security plans. Paradoxically, however, within this vast, and perhaps depressing area of the collective adhesion of wills, the underlying trends of contract law in strictly individual relations—of which there still are quite a few—evince greater respect for considerations of individual equity than was shown in the past, even in the recent liberal era of the apogee of individual autonomy. Now, the doctrine of consideration is crumbling under the advancing tide of a new equity; the variation of contracts has been reasonably freed from its old requirements of writing, while the principles of restitution and unjust enrichment begin to form a separate and large field within the law of contracts.[95]

[93] The name, "figurative and not too precise," was given by R. Saleilles, Déclaration de volonté, Paris, 1901, at 129, 230. The essential features of adhesion contracts are (a) the permanent and general nature of the offer, the indeterminate number of addressees, and the illimited or fixed period, (b) the offeror is in possession of a monopoly of law or fact, or at least of great economic power, (c) the subject of the contract is the performance of a service or the satisfaction of a need required by everybody, and (d) they are mostly drafted as type-contracts with carefully printed stipulations, the reading, let alone the understanding of which, presents difficulties to the non-initiated offerees, while most of the stipulations are made in the interest of the offeror. *Cf.,* Planiol-Ripert, 6 Traité Pratique de Droit Civil Français, by Paul Esmein, Paris, 1952, 2nd ed. at 136–37; for the intervention of the state in adhesion contracts in the interest of the adhering parties, Henri Mazeaud-Léon Mazeaud-Jean Mazeaud, 2 Leçons de Droit Civil, Paris, 1956, at 28, 58–59; W. Friedmann, Legal Theory, at 479 *et seq.;* their treatment in private international relations, *cf.,* A. A. Ehrenzweig, "Adhesion Contracts in the Conflict of Laws," 53 Columbia Law Review (1953) 1072.

[94] W. Friedmann, Law and Social Change, at 45 *et seq.*

[95] Central London Properties v. Hightrees House [1947] K. B. 130; Tungsten Electrical Co. v. Tool Metal Co. (1950) 69 R. P. C. 108; Rickards v. Oppenheim [1950] 1

Conclusions

There are none. But meet it is to refer here to the motto of this paper wherein Socrates and the Mayor of an occupied Scandinavian town, both before their execution ordered in the interest of public welfare by those who wielded at that time the controlling power, bequeathed a debt to their community. Although promised by Crito in 399 B.C., and by Dr. Winter in 1941 A.D., this debt has never been paid in full, and its symbol, the cock, is still with us. Ere it crows perchance for the third time, we should remember that the prime object of public welfare is the individual, and the achievement of public welfare in any society is contingent upon his *voluntary* acceptance of any social regulation that this purpose entails.

K. B. 616; Reading v. R. [1951] A. C. 507; James v. Kent [1951] 1 K. B. 551; Pallant v. Morgan [1953] 1 Ch. 43; Strand Electric Co. v. Brisford [1952] 2 Q. B. 246; Boots v. Christopher [1952] 1 K. B. 89, *cf.*, Sir Alfred Denning, The Changing Law, London, 1953, at 53 *et seq.;* OLG (Köln) 13, 388; RG HRR 1933 Nr. 1311; RG 126, 127, *cf.*, Enneccerus-Kipp-Wolff, 2 Lehrbuch des bürgerlichen Rechts, Recht der Schuldverhältnisse, ed. Heinrich Lehmann, Tübingen, 1958, at 870 *et seq.*, 851.

Comments

SOVIET CODIFIERS RELEASE THE FIRST DRAFTS

Soviet codifiers have worked in secrecy for over twenty years. In late June, 1958, they released for the world to read drafts of the general principles for a criminal code and a code of criminal procedure.[1] These drafts have unusual significance. They not only suggest to what extent the Soviet policy makers are willing to introduce reforms in the post-Stalin era. They also disclose a part of the new relationship, created by amendment to the constitution in 1957, between the federal government and the governments of the fifteen Union Republics of the U.S.S.R.[2]

Great numbers of articles have appeared over the past twenty years, except for the gap of the war, to give an idea of the type of thinking that was going into the new codes.[3] Crucial matters such as whether there might be an attorney for the defense during the period of the preliminary investigation, or whether Soviet judges were to be permitted to continue to penalize citizens for acts not defined as crime but believed to be analogous to prohibited acts were debated in the Soviet law reviews. There appeared references to drafts of the codes which the insiders seem to have studied, but none was published in the periodicals, and no foreigner was ever permitted to see a draft in full. Efforts to obtain these documents met with polite refusals on the ground that drafts of codes in the U.S.S.R. were secret until released.

For a time it seemed doubtful whether the world would know what had been placed in the drafts until they were issued as the new codes. The year 1957 was stated confidently by Soviet jurists to be the year of enactment.[4] As the year moved toward its end with only one legislative session of the Supreme Soviet to be held finally in late December, it became obvious that if the codes were to be enacted within the year, they would have to appear without prior publication as drafts and without public discussion. There was precedent for such sudden enactment, for many Soviet laws have reached the public without prior disclosure, but there was precedent also for prior publication and discussion. The draft of the 1936 federal constitution had been published nearly six months before enactment to be discussed in various study groups, some of which had made suggestions for revision of the draft.

The latter procedure was at last selected for the new Soviet codes. The Commissions for legislative proposals of both chambers of the Supreme Soviet of the U.S.S.R. announced their decision in June, 1958, to publish the first

[1] Byulleten Verkhovnogo Suda SSSR (Bulletin of the Supreme Court of the U.S.S.R.), No. 4 (1958) pp. 1–20.

[2] For a discussion of the amendments, see John N. Hazard, "Soviet Codifiers Receive New Orders," 6 Am. J. Comp. L. (1957) 540.

[3] For a summary, see Harold J. Berman, "Soviet Law Reform—Dateline Moscow 1957," 66 Yale L.J. (1957) 1191–1215.

[4] *Idem*, at p. 1200.

drafts in the Soviet's official journal as well as in the law reviews and declared their intention to present the drafts for enactment to the Supreme Soviet after discussion. Commentators were invited to send their comments to the Commissions at the Kremlin, Moscow.[5]

The federal-republic relationship is of unusual interest, because little had been said in the published articles preceding publication of the drafts of what the constitutional amendments of 1957 really meant. The 1956 Twentieth Congress of the Communist Party had made the decision to strengthen the sovereignty of the union Republics. The first fruits of the decision were in the administrative field, for industrial ministries were reorganized to place more authority in the Republics. By degrees the idea of placing greater authority in local hands seems to have been extended to the lawmaking process. The decision of the draftsmen of the 1936 constitution to centralize all such authority was reversed. While the 1936 constitution declared that the jurisdiction of the federal government embraced "legislation concerning the judicial system and judicial procedure; criminal and civil codes,"[6] the 1957 amendment declared the jurisdiction of the federal government to be the "establishment of the basis of legislation on the judicial system and judicial procedure, and the establishment of the basis of civil and criminal legislation."

The change shifted the authority of the federal government from the enactment of the codes themselves to the enactment of "bases" for codes. Westerners speculated on what a "basis" was, and how it would differ from a code. No clue was provided by the commentaries appearing in the law reviews. Clarification had to await appearance of the first "bases" with the publication of the drafts of June, 1958.

The first drafts suggest that "bases" for codes to be enacted by the republics will vary in character. The draft to serve as the basis for criminal codes reads like the general section of present codes. In common with the practice of Continental countries, the Republics of the U.S.S.R. have divided their criminal codes into a general and a special part. The first or general part elaborates the types of penalties that may be applied, the manner in which juvenile offenders and the insane are to be treated, the effect of self-defense, the criminal nature of negligence, conditional releases, aggravating and mitigating circumstances, the *ex post facto* effect of new legislation, *mens rea* and analogy. All of these matters are treated in the new "basis" in language which is so direct and in some cases so much of a copy of language now in use in the criminal codes that it can be assumed that the articles of the "basis" will be incorporated as they stand in the general parts of the new Republic criminal codes. Only a few articles of Part I of the new "basis" may be considered as of a directive character, not intended for incorporation in the new codes. Such are the articles restating the constitutional division of authority between federal government and Republics, and establishing a rule of conflict of laws for crimes committed in one Republic when the culprit is apprehended in another.

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[5] See Byulleten, *cit. supra,* note 1 at p. 1. The decision was taken May 26, 1958, but published officially only in mid-June; See Vedomosti Verkhovnogo Soveta SSSR, No. 11 (906), 18 June 1958, p. 587.

[6] Constitution of the U.S.S.R., Art. 14.

The "basis" for the codes of criminal procedure seems to be of a different type. The present codes of criminal procedure are arranged so as to facilitate the task of the untrained judge who is faced for the first time with the problem of conducting a trial. They start with a few "fundamental propositions" and proceed through "jurisdiction" of courts to the several stages of the proceedings. The new "basis" treats several matters found in the chapter on "fundamental propositions" in the present codes, but it also treats such matters as evidence, challenge of judges, preliminary investigation, support of the accusation in court, participation of the accused in the trial, the sentence, right of appeal, setting aside of acquittal, limitations on increasing penalties when the defendant appeals from a sentence, execution of sentence, and reopening of a case because of newly discovered evidence. These specific matters have been treated up to the present in the chapter of the code to which they relate. It is possible that the draftsmen of the new codes of criminal procedure in the republics will introduce the entire "basis" in the new codes as a first chapter on "general propositions," but it seems more likely that the specific matters relating to stages of the procedure will be incorporated in the chapters dealing with the stages concerned.

The "basis" for the criminal codes makes clear that some definitions of crime are to be outside the jurisdiction of the Republics. Its Article 2 states "Types of state and military crimes and measures of punishment for them shall be defined by legislation of the U.S.S.R. In necessary circumstances there shall also be defined by legislation of the U.S.S.R. responsibility for crimes which draw criminal punishment in accordance with international agreements concluded by the U.S.S.R." From this Article it is evident that some crimes now included in the second or "special" part of the current criminal codes will be defined by the federal government. This is no different from the present situation, for although the current codes stem from the period prior to the centralization of 1936, they have included in the first chapter of the special part definitions of "counter-revolutionary crime," which were established by the federal government and re-enacted by each Republic. In the criminal code of the Russian Republic, these are the various subsections of Article 58. The 1957 amendments of the constitution returning to the Republics authority over their criminal codes effect no change, apparently, in present practices with relationship to the authority of the federal government to protect its security.

The chief editor of the Bulletin of the Supreme Court of the U.S.S.R., L. N. Smirnov, selects the abolition of the old analogy principle as the major development of the new "basis."[7] He suggests that this change will quiet the enemies of the Soviet state who have tried to harm the Soviet Union by declaring that the present analogy article in the criminal code of each Republic was widely applied. It is true that no article of the Soviet codes was more widely quoted in proof that Soviet law recognized no limitations on the caprice of a judge. Under it a judge, subject to the possibility of reversal on review, could punish anything he wished as a crime, even though it was not

[7] L. Smirnov, Comments on the Bases of Criminal Legislation and Fundamentals of Criminal Procedure of the U.S.S.R. and of the Union Republics (in Russian), Bulletin, *cit.supra,* note 1, p. 21 at 22.

defined as such, by referring to the analogy provision and holding that the act seemed to him to be analogous to some defined circumstance not specifically violated. This provision was greatly disliked by many Soviet jurists, and suggestions for its deletion from the code appeared even before the second world war.[8] After the world war these criticisms increased, and only the intervention of Andrei Vyshinsky seems to have prevented its deletion. It is possible that the several drafts for a new criminal code, said to have been presented by the lawyers to the legislative committees of the Supreme Soviet before and after the war, foundered on the analogy problem.

The 1958 draft 'basis" is not as open in its condemnation of the analogy principle as one might have expected, given the desire of Soviet lawyers to eliminate it. Article 3, to which Smirnov refers as revocation of the analogy principle, says simply, "No one may be held criminally responsible and be subjected to punishment except for acts constituting a crime provided for by criminal law." Taking this article together with the absence of any analogy provision in the new "basis," it indicates abandonment of the old principle, but it is not as clear as it might have been in its denunciation.

Smirnov omits elaboration of another major change, to which he refers in only a few words. He cites Article 4 of the new basis, which reads, "Criminal punishment may be applied only by court sentence in accordance with law." This provision means to Soviet jurists that the Special Board of the Ministry of Internal Affairs, which were authorized as heirs of the old police courts of the *Cheka* to imprison citizens in work camps as "socially dangerous," and to do so without regard to the rules of the criminal code or the code of criminal procedure, cannot resume activities legally. They were not courts, and they acted without regard to procedural law, hence in logic they cannot function again. The matter is still a touchy one for Soviet lawyers, as evidenced by Smirnov's reluctance to elaborate upon the new principle. Perhaps they think it wise to obtain approval of the new idea and hope, thereafter, that the politicians will not revert to their old procedures in the face of a public opinion that has become sufficiently strong to make reversion too costly in terms of keeping the peace. If this new principle is adopted finally by the Supreme Soviet, it will be of interest to foreign observers, to see whether there is any attempt to rationalize the tribunals authorized in 1957 in two of the Republics to deal with "parasites."[9] There is no definition of what a parasite is, nor is there any procedure established for the conduct of trials of "parasites." Finally, it is hard to see how these tribunals can be called "courts," since they are not listed in the constitution as one of the courts of the U.S.S.R., and they do not have any resemblance to what has come to be called a "court" in the U.S.S.R. They are not standing bodies, but gatherings of citizens called together by house committees or street committees to decide the fate of a local good-for-nothing. There is no bench of judges, no public prosecutor, and no defense attorney. They are little more than the mob, controlled in

[8] A. A. Gertsenzon, The Paths of Development of the Soviet Science of Criminal Law During the Past Thirty Years (in Russian), Sovetskoe Gosudarstvo i Pravo (Soviet State and Law) No. 11 (1947) p. 73 at 81.

[9] The law was adopted in the Uzbek and Turkmen Republics in April and May, 1957. For Eng. trans. of the text, see Current Digest of the Soviet Press, Vol. IX, No. 17, pp. 16–17 (1957).

orderly fashion and subject to review by the Provincial Soviet, but still the mob.

Another principle is hailed by Smirnov as of great importance, namely that criminal law shall not have retroactive effect. This is a part of Article 7 of the new "basis." While the general parts of present codes say nothing on retroactivity, there have been instances when crimes were defined after serious disturbances had resulted in numerous arrests, and those in places of detention were tried under the new statute. As long as the analogy concept remained there was nothing illegal under Soviet codes in this retroactive effect, for even without definition of a crime by formal legislative action, a judge could have and often did find that one had been committed by analogy.

Smirnov finds the new "basis" exemplary in requiring that "fault" be found before criminal responsibility can be established. He notes that no such precise statement has appeared before, although the current codes establish that one can be held responsible only if one acted intentionally or negligently, and the new basis repeats this requirement. There has been much debate in the past twenty years in Soviet legal periodicals over the necessity of finding "fault." This debate brought ridicule to Soviet law professors from the chief of Stalin's personal secretariat, Poskrebyshev, when he reviewed the failure of the lawyers to produce an acceptable draft of a new criminal code shortly after the war. Smirnov is forced to say "Obviously, the definition of the concept of fault must be provided by legal theory, since the draft does not provide its content, limiting itself to reference only to the form of fault." Whatever fault may be held subsequently to mean, Soviet lawyers seem to feel pleased that they have achieved acceptance of an important measure of protection. Perhaps this is one more stone in the edifice they are trying to erect against a return to Stalinism's punishment of the innocent.

Acceptance of the principle that complicity can occur only in the case of intentional crime is hailed by Smirnov as another improvement. Previously, complicity could be found in negligent crime. Smirnov says that there were few supporters of such law. He is also pleased that the article on complicity now includes "organizers" along with "participants in the execution, instigators and helpers," which alone are mentioned in current codes.[10]

The list of permissible punishments has been altered in the new "basis" from what it was in the codes still in force in the Republics. There have been eliminated the penalties of declaration as an enemy of the toilers with deprivation of U.S.S.R. citizenship and expulsion from the U.S.S.R., banishment for a fixed period from the territory of the U.S.S.R., deprivation of liberty in correctional labor camps in distant parts of the U.S.S.R., and warning.[11] There remain in Article 20 of the "basis" (1) deprivation of liberty, (2) banishment, (3) exile, (4) correctional labor without deprivation of freedom, (5) deprivation of the right to engage in given employment or to engage in a given profession or activity, (6) fine, and (7) social censure. To these are added supplementary penalties of confiscation of property and deprivation of military or specialist rank, and the exceptional penalty of death—shooting—for treason, espionage, diversion terrorist acts, intended killing under

[10] Criminal Code of the R.S.F.S.R., Art. 17.

[11] *Idem*, Art. 20.

aggravated circumstances, and, in wartime, for especially serious military crimes. These so-called "exceptional" penalties are those presently being applied so that the only major change introduced by the new basis is to eliminate the work camp, which was the major weapon of the Ministry of Internal Affairs used to instil terror during Stalin's period of control. The other forms of penalty excluded by the new "basis" had, in effect, lost importance with the cooling of ardor of some of the revolutionaries for whom the threat of exclusion from the U.S.S.R. and loss of citizenship seems to have been thought a deterrent. These were the original professional revolutionaries for whom removal from the scene of the application of the principles for which they had risked their lives in fighting the revolution to successful overthrow of the Tsar would have been psychological torture.

Neither exile nor banishment, which remain in the new "basis," seem to hold within them the threat of return to the old work-camp system of the Ministry of Internal Affairs, for under existing understanding of the two terms, they mean respectively, removal of an individual from a given locality for a fixed period, with the obligation that he live in a certain place, and removal from a specific locality without obligation that he live in any fixed place. Both forms have been used extensively in the past, the former to require individuals to live in remote Siberian towns where they work under unpleasant climatic and physical conditions far from old haunts but nevertheless without being kept behind barbed wire, and the latter to oust individuals from the communities in which they have lived, often with the suggestion but without the application of compulsion that they take up residence in a new community in the Far East.[12] Article 23 of the new "basis" defines the penalties of exile and banishment in the established terms, and requires that such penalties be limited in time to five years and not be applied to minors, less than 18 years of age. The current rule permits application of these penalties to minors 16 and over.

Except for this exclusion of minors from the application of exile and banishment, and similar exclusion of persons under eighteen from application of the death sentence (Article 21), the new "basis" establishes no general limits on responsibility of minors. Apparently, this matter is left to the discretion of the Republics. If so, it is the only major point over which debate has raged in the years that have passed on which the federal government is not now establishing rules.

The maximum term of imprisonment is reduced by the new "basis" to ten years for ordinary crimes, and fifteen years for especially serious crimes.[13] The ten year maximum for ordinary crimes has stood for many years in Soviet codes, but the exceptional prison term has had a maximum of 25 years ever since the period of the purges in the late 1930's.[14] In some measure the "basis" establishes, therefore, a lighter maximum for such serious crime as that for which the death penalty is not prescribed.

In the field of criminal procedure Smirnov selects two points for special comment; the placing of the burden of proof on the prosecution and the right

[12] *Idem,* Art. 35.
[13] Art. 22.
[14] Criminal Code of the R.S.F.S.R., Art. 28.

to defense counsel. The first matter is related to the presumption of innocence, which Soviet law professors have argued exists in Soviet law, but for which there is no precise support in present codes.[15] Article 13 of the new "basis" avoids mentioning any presumption of innocence. It reads, "The duty of proving guilt of the accused lies on the accuser. A conviction may not be based upon suppositions and shall be found only if the guilt of the accused in committing the crime is proved."

The right of counsel has been guaranteed by the constitution since 1936,[16] but the point at which the guarantee applies has been the moment when the case was transferred to court.[17] Since Soviet criminal procedure is like continental procedures generally, in that a preliminary investigation of exhaustive character precedes transfer of the case to court, present codes in effect deny the right to counsel at the time he is most necessary, namely when the investigator is interrogating the suspect and calling witnesses named by him. Soviet authors have complained in the past that when a case actually reaches court, it is humanly difficult for a judge not to conclude that the guilt has been proved by the preliminary investigation, and only verification of the proofs is required.

Many Soviet authors have argued since the war that the right to counsel should be extended to the preliminary investigation, and the difficulty of proving innocence once the case has gone to court has been frankly admitted. The new draft "basis" will disappoint those who hoped for a real change in the law on the subject of counsel, for its provision enlarges the right only slightly. Under present codes the accused is permitted counsel only when the indictment is presented to the accused.[18] This need not be more than three days before trial. Under the proposed revision, counsel may be demanded when the accused is informed that the preliminary investigation has been terminated. Since it was customary in the past to permit some time to elapse between termination of the investigation and transfer of the case to court with presentation of the indictment, it may be that the new rule will give the accused more time to prepare his defense with his counsel. The draftsmen of the new rules seem to appreciate that the right to counsel is still quite narrow, for the new article would require juveniles to be given the right to counsel from the moment that the preliminary investigator informs them that they are under accusation and begins the investigation, rather than after he has finished and prepared the indictment.

The lack of clarity in Soviet thinking on this point is indicated by Smirnov's comments. He has found himself in agreement with the draft's proposals because "Practice gives evidence of the fact that after having acquainted himself with the dossier the accused in many cases files such substantial requests for supplementary investigation that execution of these requests substantially changes the first conclusions in the case. It is thought that the right to counsel from the moment that notice of accusation is given, especially in group cases,

[15] See Prof. M. S. Strogovich, Ugolovnyi Protsess (Criminal Procedure) (1946) pp. 159–160.

[16] Constitution of the U.S.S.R., Art. 111.

[17] Code of Criminal Procedure of the R.S.F.S.R., Art. 252.

[18] *Idem*, Art. 235.

could reflect unsatisfactorily on the time required for and the quality of the investigation of these cases."[19]

While Smirnov's explanation may not be intended to mean what it appears to mean to a Western mind, it is hard to escape the conclusion that he is reluctant to have a good case for the state upset prior to trial by the picking of holes in it by an able attorney. He has confidence in the investigator and considers that it is better to go to trial and have the holes picked in the case at that point, if they can be picked on the short notice allowed, than to have the coming to trial delayed by further investigation of what he seems to consider aspects of the case presented only for dilatory purposes.

Publication of the drafts marks the defeat of one dramatic proposal put forth after Stalin's death. The draft has rejected completely reform of the court to include a jury. While this proposal was made in guarded form as an expansion of the number of lay judges from two to six and placing upon them the decision of the question of guilt, it was immediately dubbed by its critics as the restoration of the jury system of Tsarist days. Still, it was honored by an article in the principal newspaper, *Izvestiya,*[20] which suggests that it was not to be treated lightly. The draft "basis" for criminal procedure continues in force the present form of court by requiring that courts of original jurisdiction be composed of a professional judge and two lay judges, while courts sitting to hear appeals shall be composed of three professional judges.

Discussions in the Soviet press up to the very eve of publication of the drafts suggest that Soviet law is at a crossroads. There are elements from the legal profession, usually from those who are of middle age or older who seem to be determined to reform Soviet law to eliminate those features which have facilitated the type of tyranny which Stalin epitomized. There are some young members of the legal profession who seem unconcerned about a recurrence of Stalinism, or, perhaps, they seek to curry favor with the supreme politicians by being "more royalist than the king." The supreme politicians in the Communist Party have remained silent. No outsider can know what they think, although it can be assumed that they are in favor of some measures of reform because they countenance the activity of the law professors, and they expressed a desire after Stalin's death to eliminate the terror he exercised. Still, they have not been averse to acting without reference to the codes in ridding themselves of their new found enemies, beginning with the secret "trial" and execution of Lavrenty Beriya, and arriving at the very time of public release of the new drafts at the secret trial and execution of Imre Nagy and General Maléter in Budapest.

Evidence of the conflict of views has been demonstrated most forcefully in an exchange of articles over whether the work of the courts should be subject to judicial or executive review. A Deputy Minister of Justice in the Kirgiz Republic proposed in *Izvestiya* that the various Ministries of Justice in the Republics be restored the rights of which they were deprived by decree of August 4, 1956, to inspect the work of the courts, although some Ministries

[19] Smirnov, *op. cit., supra,* note 7 at p. 25.

[20] See Rakhunov, "Some Questions of Criminal Procedure" (in Russian), Izvestiya, March 27, 1957, p. 2, col.1.

are said still to be continuing inspection. Inspection has, apparently, involved examination of decisions so as to permit the inspector to determine whether a given court is performing badly. While an inspector cannot set aside a decision, his conclusions are said to have had great influence on future activity of the court found wanting.

To this proposal that there be a return to what is a direct channel of control for the administrator over the judicial process, the Vice President of the Supreme Court of the U.S.S.R. has found it necessary to reply, also in *Izvestiya*.[21] He finds such a proposal unconstitutional, as in violation of Article 112 providing that judges are independent and subject solely to the law. Only the usual procedure of review by appellate courts will conform with the requirement of Article 112 in the Vice-President's view. He argues further that inspection of the work of the Republic Supreme Court by the Ministries of Justice is unconstitutional as violating Article 106 providing for election of the judges of a Republic Supreme Court by the Supreme Soviet of the Republic. To permit a Ministry to intervene in the work of the court is to upset the direct relationship between the Supreme Soviet and the Court. Although he does not say so, his argument sounds like an application of the familiar continental argument for separation of powers as between administration and judiciary.

The very fact that a Vice President of the U.S.S.R. Supreme Court has found it necessary to present arguments which seem obvious to Western minds to put down a proposal to bring the court system under the thumb of the administration suggests the weight of the opposition to post-Stalin reforms. There must be some within the administration who are fearful of what a truly independent judiciary may do, in spite of the controls remaining in the Soviet system of government, including the selection of judges by Supreme Soviets, which up to the present have been completely controlled by the caucus of the Communist Party members within each of them. It is inconceivable to the outsider that a judge who departed from what the Party might want could remain in office for long, and many of the judges, being themselves members of the Communist Party are subject to the more direct influence of party discipline which requires their conformity to Party policies. When such features exist to restrict a judge's freedom of choice, it is remarkable that administrative officials show their fear by seeking to establish their own direct control over the activity of the courts.

Evidence of the Stalin-like conservatism of the young men who profess to be afraid of the proposals for reform put forward by their superiors among the legal scholars appears in an article in a recent issue of the Institute of Law's legal periodical.[22] The author is the sole person in the issue not listed as having an academic degree, and from this it may be presumed that he is young or perhaps without academic training, although the latter seems unlikely due to the fact that his article bears copious references to legal literature.

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[21] See N. Morozov, "On Organization of the Court System (in Russian), Izvestiya, May 18, 1958, p. 4. For Eng. trans., see Current Digest of the Soviet Press, Vol. X, No. 20, pp. 6–7 (1958).

[22] See B. A. Viktorov, "On Criticism of Some Propositions in the Theory of Criminal Procedure" (in Russian), Sovetskoe Gosudarstvo i Pravo (Soviet State and Law), No. 3 (1958), pp. 88–94.

He chooses to criticize the principal figures in Soviet law for their espousal of certain aspects of legal reform. Thus, he criticizes Professor M. S. Strogovich for demanding that "flexible" prosecutors and judges be replaced with "inflexible" ones. He asserts that "in life the application of law must be accomplished on the basis of a dialectical approach to it." While this commentary can be supported if it means nothing more than that law can never be applied rigidly and blindly to a given situation, it seems to mean more, for Strogovich was arguing not for blindness of judges to the hardship formal application of a law may work but rather against the ever-recurring tendency of Soviet judges and prosecutors to take the short view and bend to the political winds of the moment blown by local administrators. Strogovich's view seems to be that the best position for long range political advantage to the Soviet system is one requiring stability in the judicial system, so that it is an arm apart from the administration. To Strogovich there is a special judicial function to be performed which is separate from the administrative one, even though both the judge and the administrator receive their political inspiration from the same font, namely the Communist Party. This view of the venerable professor of criminal procedure, from whose pen the textbooks in the field have come for over twenty years, seems to be simply beyond the grasp of some of his less experienced colleagues.

The delays with which the drafting of "bases" for codes have been met, and the recurring attacks upon those who seek extensive reform in the judicial process suggest that the battle has not yet been decided. Even if the drafts are adopted, there are minds within the U.S.S.R. which seem to be able to adjust themselves to a dual system, one part of which functions in accordance with published rules designed to assure a measure of justice, and the other part of which lies outside the law. Professor Harold J. Berman met this attitude when he argued that the new parasite law was unconstitutional because the mass meeting which has the authority to exile a "parasite" is not a court, and only a court is authorized to punish. The same Vice-Chairman of the Supreme Court of the U.S.S.R. who is now arguing against extension of the powers of the Ministry of Justice to inspection of the courts told Berman that there was no conflict between the Constitution and the parasite statute because the general meeting was not acting like a court.[23] The former Soviet member of the Prosecution at the Tokyo war trials also suggested that the parasite law was not violative of the constitution because banishment was not a form of criminal punishment. If highly placed legal officers can interpret tribunals and penalties as something other than what they are, the possibility remains that the reforms begun by publication in mid-1958 of new "bases" for criminal procedure and criminal law cannot be taken for the present, at least, to be effective in eliminating the evils to which the Twentieth Communist Party Congress called attention in its denunciation of the "cult of the individual," namely Stalinism.

JOHN N. HAZARD*

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[23] See Berman, *op. cit., supra,* note 3 at p. 1209.

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AUSTRALIAN ANTI-MONOPOLY LEGISLATION

Anti-monopoly legislation along the lines of the Sherman Anti-Trust Act has not had a successful history in Australia. Federal legislation, modelled in part on the Sherman Act, was passed in the form of the Australian Industries Preservation Act of 1906.[1] Although still on the statute book this Act has been virtually a dead letter following the failure of an early prosecution in the Privy Council[2] and six unsuccessful attempts by several federal governments between 1910 and 1919 to extend power in this field by constitutional amendments.[3] At the same time, however, both state and federal governments have utilized other more direct methods to control monopoly and sustain or stimulate competition. With insignificant exceptions, Australia's railway systems are state or federally owned, and state ownership of railways has been an accepted feature of the Australian business structure since the nineteenth century. This has been the forerunner of a widely accepted view that public utilities regarded as "natural monopolies" are a legitimate form of governmental enterprise. In most states electricity undertakings are state owned, gas corporations have been taken over, and in large cities public transport has been progressively incorporated into city or state-owned systems. To stimulate competition, federal governments have set up government-owned corporations to operate in competition with large combines. Examples of these are the federally-owned Commonwealth Bank, an internal airline and a Commonwealth Shipping Line, all three of which carry on business in active competition with private enterprise. Nationalization was resorted to in 1947 when an attempt was made to nationalize all of Australia's private banking institutions, but this failed when the legislation was declared unconstitutional by the Privy Council.[4]

The Australian Industries Preservation Act was passed under section 51(xx) of the Australian Constitution which empowers the federal government to legislate for "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth," and further supported by the Australian commerce powers which give the federal government power to legislate with respect to "trade and commerce with other countries, and among the States."[5] Coming as it did, in an era when the High Court of Australia was intent on preserving the balance of federalism by applying the doctrine of implied immunity of state and federal governmental instrumentalities from mutual legislative interference, as a necessary implication to be read into Australia's federal compact,[6] it is not surprising that the Act

[1] Now known as the Australian Industries Preservation Act 1906–1950. There have been a number of amendments since 1906. Most have been of a minor or technical nature, with the exception of amendments in 1909 and 1910. Sections 5 and 8 were repealed in 1909 after being declared unconstitutional in Huddart Parker v. Moorehead, 8 C.L.R. 330. For the important amendment in 1910 see *post* footnote 12.

[2] Attorney-General of the Commonwealth v. Adelaide Steamship Company Limited, 18 C.L.R. 30.

[3] See Knowles, The Australian Constitution, 217, 229, 235, 241, 247, 255, 257.

[4] Commonwealth of Australia v. Bank of New South Wales [1950] A.C. 235.

[5] Australian Constitution, Section 51(i).

[6] The doctrine enunciated by the full High Court, following the United States Supreme Court in McCulloch v. Maryland (1819) 4 Wheat 316 and Collector v. Day

was viewed with some suspicion by the then constituted High Court of Australia, particularly insofar as it might impinge on state powers.[7]

The federal legislature received an initial setback when the Act first came under the scrutiny of the High Court in *Huddart Parker v. Moorhead*.[8] Two sections of the Act were declared unconstitutional with the Court refusing to countenance any use of section 51(xx) of the Constitution to interfere with intra-state trade.[9] A marking off point from the Sherman Act in the Australian re-enactment of Section 2 of the Sherman Act was the addition of the words "to the detriment of the public" in providing that: "Any person who monopolizes or attempts to monopolize or conspires with any other person to monopolize any part of the trade or commerce with other countries or among the States, with intent to control to the detriment of the public, the supply or price of any service, merchandise or commodity, is guilty of an indictable offence."[10] These words proved to be the major stumbling block for successful prosecution of organizations engaged in interstate trade when the Act finally came up for consideration by the Privy Council in 1913. The Act was not declared to be *ultra vires* the Commonwealth, but the Commonwealth prosecution against the Adelaide Steamship Company failed as the combination under attack was held not to have the intent to act detrimentally to the public. Speaking for the Judicial Committee, Lord Parker of Waddington declared:

> "In the argument upon the true construction of the Act of 1906 considerable stress was laid on the cases decided by the Supreme Court of the United States under the analogous Statute known as the Sherman Act, and in particular on the case of the *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1. Although the judgments in this case are valuable for the light they throw on the development of the common law touching monopolies and contracts in restraint of trade, their Lordships do not think that the decisions themselves are of any real assistance in the present case. The Sherman Act, construed strictly, makes every contract or combination in restraint of trade, and every monopoly or attempt to monopolize, a statutory misdemeanour irrespective of any sinister intention on the part of the accused and irrespective of any detriment to the public. The actual decision is that contracts in restraint of trade which

(1870) 11 Wall, held sway until overruled in The Engineers Case, Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (1920) 28 C.L.R.129. A much emasculated version of the doctrine has been resuscitated in West v. Commissioner of Taxation (N.S.W.) (1937) 56 C.L.R. 657, South Australia v. The Commonwealth (1942) 65 C.L.R. 373, Essendon Corporation v. Criterion Theatres (1947) 74 C.L.R. 1, Melbourne Corporation v. The Commonwealth (1947) 74 C.L.R. 31.

[7] The doctrine was referred to in argument by Griffith C. J. and in the judgment of Barton J in Huddart Parker v. Moorehead (1909) 8 C.L.R. 330.

[8] *Loc. cit.*

[9] No clearcut enunciation of the power given by Section 51(XX) can be gleaned from the differing judgments. The majority seemed to agree that the Commonwealth could not create corporations or a body of national company law, and yet they took the position that legislation under this section must deal with the internal organization of foreign corporations or corporations created under state laws. This is a most unsatisfactory decision.

[10] Australian Industries Preservation Act, 1906, Section 7(1).

> are enforceable at common law are impliedly excepted from the express provisions of the Act. The enforceability of the contract becomes in this way the test of its legality. There is, however, no justification for applying a similar test in the case of an Act which, like the Act of 1906, only deals with contracts or combinations or monopolies or attempts to monopolize which involve detriment to the public and in which a sinister intention is of the essence of the offence."[11]

The Adelaide Steamship Company had been prosecuted under the Act as amended up to 1909. In 1910 section 7(1) was amended by the deletion of the words "with intent to control to the detriment of the public, the supply or price of any service, merchandise or commodity."[12] No decision has been given on the effect of this changed wording as no further prosecutions were launched after the Adelaide Steamship case. The Act has fallen into desuetude with the failure of the six attempts to amend the constitution to give the federal government greater power to deal with monopolies making prosecutions politically inexpedient and their outcome problematical.

Now, after forty years, a new attempt has been made to enter the field of general monopoly regulation, this time by the government of the state of Western Australia in the Unfair Trading and Profit Control Act of 1956.[13] The objects of the Act are to prevent unfair profit taking, unfair methods of trading or trade competition. A broadly phrased series of definitions provides the framework for the operational effect of the legislation. Unfair trading is defined as "taking any unfair profit, using any unfair trading method [or] using any unfair method of trade competition." Acting in combination with any other person or as a member of a combine to do any of these things, to attempt to or to aid or attempt to aid any person in procuring or attempting to procure any of these objects is also "unfair trading." "Unfair trading methods," or "unfair method of trade competition" mean—

> (a) The making of or entering into any contract or agreement, with any person or the continuing to be a member of or engaging in any combine, in relation to trade or commerce within the State in restraint of or with intent to restrain trade or commerce contrary to the interest of the public; or to the destruction or injury of, or with the intent to destroy or injure by means of unfair competition, any industry the preservation of which is advantageous to the State.
>
> (b) The making of or entering into any contract or agreement providing for the establishment or maintenance of minimum resale prices of commodities, or for the limiting the distribution thereof, between persons in competition with each other.
>
> (c) The monopolizing or attempting to monopolize, or combining with any person to monopolize, any part of the trade or commerce within the State. This is subject to the proviso that this provision will not apply

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[11] Attorney-General of the Commonwealth v. Adelaide Steamship Co., 18 C.L.R. 30, 39, 40.

[12] Act 29 of 1910, section 4.

[13] Act 30 of 1956. Originally the Act was stated to continue in operation only until December 31, 1957. It has now been extended, *sine die*, by the Unfair Trading and Profit Control Act, 1957, section 12.

to the sole distribution rights of a commodity carrying the trade mark, brand or name of the producer or distributor which is in free and open competition with commodities of the same general class produced or distributed by others.

(d) The discriminating in price between different purchasers of goods of like grade or quality where the effect of such discrimination may be contrary to the public interest substantially to lessen competition, or tend to create a monopoly in any line of trade or commerce, or to injure, destroy or prevent competition.[14]

(e) Being a party, whether as seller or purchaser, to a sale by or to a person engaged in trade, commerce or industry, that discriminates directly or indirectly against competitors of the purchaser, in that a discount, rebate, allowance, price concession, or other advantage, is granted to the purchaser over and above any discount rebate, allowance, price concession or other advantage, available at the time of the sale to the competition in respect of a sale of goods of like quantity and quality.[15]

The Act makes important departures from the Sherman Act and the Australian Industries Preservation Act in the form by which prosecutions are launched and the offences proved. Originally a Commissioner experienced in "commercial, business and trading affairs" was responsible for both preliminary investigation of alleged breaches of the Act and then determining after an inquiry whether an offence had in fact been committed. This type of procedure, under which the Commissioner was both judge and prosecutor has now been replaced by the creation of the post of Director of Investigation.[16] In addition to the appointment of a Commissioner who is now known as the Unfair Trading Control Commissioner,[17] the Director must be a member of one of Australia's recognized accountants' professional bodies and similarly to the Commissioner must have a knowledge of commerce, trading and business. Whenever the Director of Investigation has reason to suspect that there is unfair trading and is of opinion that it is in the public interest to do so, he acts under the powers of investigation conferred by the principal Act. These provide the Director and "authorized officers" with wide powers.[18] If, as a result of his investigations, the Director has reason to believe that a person has been guilty of unfair trading he may then charge the person with unfair trading before the Unfair Trading Control Commissioner.

The Commissioner is vested with wide quasi-judicial powers to hold an inquiry to determine whether an offence has been committed under the Act.[19] The Commissioner is given a mandate to "act according to equity, good conscience, and the substantial merits of the case, without regard to technicalities or legal forms."[20] It would seem that the inquiry must be held at least partially *in camera,* whatever that may mean in practice. Section 29(3)

[14] *Ibid.,* section 8.
[15] Inserted by the Unfair Trading and Profit Control Act, 1957, Act No. 57 of 1957, Section 3(d).
[16] *Ibid.,* section 3(b).
[17] *Ibid.,* section 3.
[18] Act 30 of 1956, sections 18–27, Act 57 of 1957, sections 8–10.
[19] Act 30 of 1956, section 29.
[20] *Ibid.,* section 29(3)(d).

(b) mandatorily requires that the Commissioner shall exclude the public from hearing the inquiry "wholly or in part." Upon the completion of the inquiry the Commissioner, if satisfied that the charge is proved, may do one of three things—

(a) He may issue a caution if he considers the charge trivial.

(b) He may accept an undertaking from the person charged that he will cease from the commission of the offence charged.

(c) He may decide that the person against whom the charge has been proved should be declared to be a "declared trader."[21]

If the Commissioner decides that the person charged should be declared to be a "declared trader," he must then have "due regard" to the opinion of an Advisory Council, set up to assist him to determine whether this decision should be adhered to.[22] The Advisory Council comprises four persons. Two represent commercial interests, one representative is nominated by the government to represent the general public, and the fourth represents primary producers. The Act does not make it clear as to what effect an Advisory Council opinion contrary to the Commissioner's finding would have, if at all. All that is mandatorily required is that: "The Commissioner shall not declare a person to be a declared trader . . . unless and until the Advisory Council has first determined the circumstances and conditions in and under which it appears right and proper in the cause of justice to so declare a person. . . ."[23] After a finding that a person is a "declared trader" the Commissioner may then operate under Part IV of the Act which empowers the Commissioner to issue directions to the "declared trader" to cease unfair trading and most importantly he can direct the trader not to sell or offer for sale, or for hire or for use, whether as principal or agent any goods and services, or classes of goods or services

(i) At a price greater than that specified in the direction, or in any subsequent direction which the Commissioner issues.

(ii) In any manner or locality other than specified at the Commissioner's direction.[24]

Failure to obey the Commissioner's directions, or any other provision of the Act is made an offence punishable at any time up to two years after the cause of complaint arises.[25] The penalties for breach are considerable. Conviction can lead to a fine not exceeding £500 or a term of imprisonment up to six months.[26] Where the person convicted is a body corporate every person who was a director or officer at the time of the offence is personally liable for conviction unless the offence was committed without his knowledge.[27] If the

[21] *Ibid.*, section 30.

[22] *Ibid.*, section 9.

[23] *Ibid.*, section 30. Wolff, Senior Puisne Judge, in Cockburn Cement Pty. Ltd., v. Wallwork, 59 W.A.L.R. 75, 117, expressed the opinion that even in the case where the whole of the Council expresses a unanimous opinion the Commissioner may refuse to follow the advice.

[24] *Ibid.*, section 30.

[25] *Ibid.*, section 34.

[26] *Ibid.*, section 35(1).

[27] *Ibid.*, section 35(2).

Commissioner finds that unfair profits have been made a further conviction may be recorded against the accused, with a fine not exceeding twice the amount of the unfair profits.[28]

The Act specifically limits the right of appeal to ordinary judicial tribunals. A person aggrieved by the decision of the Commissioner may appeal to a Judge of the Supreme Court of Western Australia. Such an appeal is to be heard in Chambers, and the Act declares that the decision of the Judge shall be final.[29] Although in form this precludes an appeal to the High Court of Australia, there is no doubt that appeals can be made to that tribunal under the Federal Judiciary Act,[30] and indeed the Judiciary Act itself tacitly recognizes this by a saving clause which states that the Act "shall be read and construed so as not to exceed the legislative power of the State, the intention being that when any enactments in this Act, but for this section, have been construed as being in excess of that power, it shall nevertheless, be a valid enactment to the extent to which it is not in excess of that power."[31]

Despite the formal curtailment of appeals under the Act, both the full court of the Supreme Court of Western Australia and the High Court of Australia have already had the Act brought to their notice. In *R. v. Wallwork Ex Parte Cockburn Cement Pty. Ltd.*,[32] the Western Australian Supreme Court considered the general terms of the Act when two companies sought to prevent the Commissioner from proceeding with an inquiry into their activities, by seeking an order against the Commissioner in the form of a prerogative writ of prohibition. When the order was denied to one company and the Commissioner was permitted to proceed, an appeal against this decision was taken to the High Court.[33] Speaking for the High Court, Chief Justice Dixon pointed out that as the appeal was against a denial of prohibition the Court could only inquire into the Commissioner's jurisdiction and it would be better to await a final judgment so that the court could fully canvass the issues involved in the Act. To date, however, the High Court has not had an opportunity to scrutinize the Act to test its constitutional validity.[34] Following the denial of prohibition, the Commissioner duly held an inquiry into the activities of Cockburn Cement, and it was held to be a monopoly and a "declared trader." On appeal by the company to a single justice of the Supreme Court, the order of the Commissioner was reversed, so that the High Court of Australia has not yet had an opportunity to discuss fully the merits of the enactment.[35]

When the Unfair Trading and Profit Control Act does come up for full discussion in the High Court, there is little doubt that a major consideration

[28] *Ibid.*, section 35(3).

[29] *Ibid.*, sections 30(3), 39. Section 39 provides, however, that an appeal against conviction of an offence under the Act, e.g., a fine levied under section 35(1) is appealable in the ordinary way. Offences are prosecuted with the consent of the Attorney-General, (Section 34(3)) and are to be heard, not by the Commissioner but by a Magistrate sitting alone or with Justices of the Peace.

[30] Commonwealth Judiciary Act 1903–1955, section 35.

[31] Act No. 30 of 1956, section 5.

[32] 59 W.A.L.R. 49 (1957).

[33] 59 W.A.L.R. 72 (1957).

[34] *Ibid.*, 73.

[35] Cockburn Cement Pty. Ltd. v. Wallwork, 59 W.A.L.R. 75 (1958).

will be the effect on the Act of Section 92 of the Australian Constitution which has proved to be a bulwark of interstate free trade by providing that "trade, commerce and intercourse between the states" shall be absolutely free. It could well be that Western Australia's attempt at monopoly regulation could fall foul of this widely embracing section of the Australian Constitution, which has proved so potent in curtailing state interference with trade and commerce.

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DECISIONS

United Kingdom: Copyright in "The Merry Widow"—(1) The musical comedy "The Merry Widow" (translation of German title *"Die Lustige Witwe"*) was created at the beginning of this century, but still enjoys great popularity in many countries. The music was composed by Franz Lehar, Vienna; the libretto was written in collaboration by Victor Leon and Leo Stein, both also of Vienna. The first performance took place in Vienna in 1905; the first performance in the English language in 1907 in London. Leo Stein died in 1921, Victor Leon in 1940, and Franz Lehar in 1948.

On November 30, 1905, the three authors—the composer and the two librettists—concluded an agreement with the musical agents Felix Bloch Erben (F.B.E.) Berlin, by which *inter alia* they conferred upon F.B.E. the exclusive right, against payment of certain royalties, to exploit and "place" the play for performance on stages wherever situated and in any language whatsoever. This agreement (referred to as "the F.B.E. agreement") stated that it should be construed under German law. On the basis of the agreement, F.B.E. concluded on February 27, 1906, an agreement with George Edwardes of the Gaiety Theatre, London (referred to as the "Edwardes agreement") by which Edwardes obtained the exclusive right to perform the play on stages in the English language in the United Kingdom, including the British colonies, in Ireland, the United States, and Canada. The parties agreed that English law applied to the Edwardes agreement. Edwardes died in 1915. His executor in 1920 assigned his interests in the play to George Edwardes (Daly's Theatre) Ltd., from which the interests passed by successive assignments first to British Amalgamated Theatres Ltd. (1929), then to Metro-Goldwyn-Mayer Inc. (1931), and finally in 1941 to Loew's Incorporated, the plaintiffs in the present action. The authors received royalties from these various successors and seemed to acquiesce in said assignments. Their legal representatives, however, started inquiries and arrived at the conclusion that Edwardes's rights had not been transferable, so that after his death the stage performance rights granted to Edwardes had reverted to the authors. After some correspondence Loew's Incorporated in 1955 began an action for copyright infringement in the English Courts and claimed a declaration that they owned the exclusive stage performance rights in the English language in the United Kingdom. The legal representatives of the authors, among the defendants in the action, counterclaimed a declaration to the contrary. In both instances, it was agreed that the decisive question was:

(i) whether F.B.E. could under the F.B.E. agreement *transfer* the rights granted to them so as to make them *freely* and *unrestrictedly transferable* by any person into whose hands such rights might have come, and

(ii) if they could, whether they *in fact did so* by the Edwardes agreement.

(2) Judgment of *Mr. Justice Vaisey,* Chancery Division. The Court heard two expert witnesses on German law, Professor E. J. Cohn on behalf of the plaintiffs and F. A. Mann on behalf of the defendants. Both experts agreed that under Section 133 of the German Civil Code, a contract should be interpreted so as to give effect to the apparent intention of the parties rather than to the literal meaning of the words; further that F.B.E. could not make an assignment of their rights *"in toto";* and that the F.B.E. agreement created a commission agency which put upon F.B.E. the duty of exploiting the play by finding suitable persons to perform the play in Germany and elsewhere, and of doing what was reasonable to carry out that duty. The learned experts were also agreed that the F.B.E. agreement contained a transfer of the stage performing rights. But whereas Dr. Cohn expressed the view that an agreement which passed to the transferee a transferable right was reasonable and indeed that it carried out the very purpose of the F.B.E. agreement, Dr. Mann held to the contrary. He pointed out that the assignment of the rights of performance in such way that they could be further transferred, did not come within the term "reasonable" unless there had been express power to that effect in the agreement. Both experts referred to respective dicta in textbooks on German copyright law, of which English translations were submitted to the Court.

Mr. Justice Vaisey confessed that, after having listened to the interesting evidence given by the experts, he was left in considerable doubt respecting the one point upon which the decision depended. He quoted the principle *"delegatus non potest delegare"* and after having considered all the arguments placed before him by counsel of either side decided that on the true construction of the Edwardes agreement that document did not convey to Edwardes more than a personal interest terminable on his death. He saw in the position of the supposed successors only that of temporary licensees and stated that the authors or their representatives were not, had never been, and were not now, bound to recognize the plaintiffs, who were not selected by F.B.E., as permanent proprietors of the performing rights, even though F.B.E. and the authors have been content from time to time in the past to recognize the plaintiffs as temporarily filling that position. If the plaintiffs' claim were to succeed, His Lordship continued, they would presumably be enabled to pass on the performing rights, which belonged in his lifetime to the late George Edwardes, or to give to some assignee the power to pass them on to a whole series of successors, some of which might conceivably be more interested in suppressing the play than in promoting its success. He therefore ruled that the plaintiffs' claim failed and that the counterclaim of the authors' legal representatives succeeded and must be allowed with costs.[1]

[1] Judgment delivered on 25th October 1957; reported in (1958) 2 Weekly Law Reports 787; The Times, Law Report, 26th October 1957; The Author, vol. 68, p. 71. (F. E. Skone James.)

The plaintiffs appealed to the Court of Appeal.

(3) Judgment of the Court of Appeal (*Lord Justices Jenkins, Romer and Ormerod*). The judgment of Mr. Justice *Vaisey* was reversed.

(i) The Court considered the opinions given by the two eminent experts very thoroughly, but found no sufficient authority or unanimity of view among the German writers cited by the experts which would justify a construction which appeared on the face of it contrary to the plain meaning of the words of the F.B.E. agreement. It was agreed by both experts, the Court pointed out, that George Edwardes was a producer of the highest reputation, so far as plays of this type were concerned, and it is a reasonable inference the F.B.E. would be anxious to obtain his services; but it would be surprising if an impresario of the standing of George Edwardes would be willing to go to the expense of having the play translated and adapted for performance in England, if the right he had acquired was to last only as long as he should live and not carry with it any right of transmission. The Court also thought that in order to obtain production of the play by producers of standing, it would not be possible to grant them rights which terminated at Edwardes' death; it was, therefore, reasonable for Bloch to grant transferable rights of performance.

The Court further referred to the opinion expressed by both experts that the subsequent conduct of the parties could be taken into account in ascertaining the intention of a document, and stressed that the conduct of the authors and of F.B.E. was consistent only with the view that the powers given in the F.B.E. agreement were not limited, but enabled F.B.E., if circumstances so warranted, to transfer rights which were themselves transferable.

For those reasons the Court of Appeal found that F.B.E. were entitled to grant transferable rights and had actually done so in the Edwardes agreement.

(ii) But that was not the end of the matter. The play and assignments were made before the coming into force of the Copyright Act, 1911. Prior to that Act the period during which copyright existed was the life of the author and seven years after his death. Of the two librettists of the play, Leon was the second to die in 1940 and apart from the 1911 Act the copyright in the words would have expired in 1947. Lehar died in 1948 and so the copyright in the music would have expired in 1955. The Copyright Act, 1911, extended the period of protection to fifty years after the author's death. Therefore, the copyright in both music and words is still in existence. Provision was made in the 1911 Act for rights acquired before it came into force. Section 24 of that Act—which was maintained by the 1956 Act—granted to the assignees a double option. The time for exercising the first option had expired. But rights remained in the assignees under the second option as well and the question arose what were the rights remaining to the plaintiffs under the second option. It was not disputed that in the event the plaintiffs were held to have a transferable right (and this was so held on appeal), this was a case where an author had before the commencement of the 1911 Act assigned his right or any interest therein for the whole term of copyright. The plaintiffs submitted that, by exercising the second option, they were entitled to maintain the rights as they had had them before, i.e., as exclusive

rights, whereas the defendants alleged, that the plaintiffs had no rights under the wording of Section 24 because they had done nothing more than authorize the production of the play without performing it themselves. The Court adhered to neither of these constructions of the relevant words in Section 24, but took a middle view. It was held that the option did not give the plaintiffs the *sole* right to perform in the United Kingdom, which they had under the Edwardes agreement of 1906, but a *nonexclusive* right to perform the play in the United Kingdom and to authorize others to perform it also.

According to this conclusion arrived at by the Court of Appeal the latter made an Order[2] on 1st April 1958 to the effect:

(a) that the plaintiffs were, as to the words of the play until February 23, 1947 (seven years after Leon's death) and as to the music until October 24, 1955 (seven years after Lehar's death) the owners of that part of the copyright in the play which consists in the sole right to perform the play in public on the stage in the English language in the United Kingdom;

(b) that the defendant Otto Blau (as to said music) and the defendants Anna Amalia Hebein and Fritz Stein, who are the late author's legal representatives (as to said words), will during the residue of the respective times of copyright be the owners *inter alia* of the above-mentioned parts of the copyright;

(c) that the plaintiffs have been since the respective terms of copyright and will be during said terms, subject to payment of royalties, entitled to a nonexclusive license to perform the play in public on the stage in the English language in the United Kingdom and to authorize others so to perform the play.

Leave to appeal to the House of Lords was granted, but as no appeal was lodged the decision of the Court of Appeal has become final.

To summarize the result, the authors' legal representatives are now the owners of the copyright in the "Merry Widow" in the United Kingdom; but subject to a nonexclusive license of Loew's Incorporated as to the stage performing right in public in the English language in the United Kingdom.

PAUL ABEL*

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[2] Reported by F. E. Skone James in The Author, vol. 68, p. 98.

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Book Reviews

GRAVESON, R. H.—CRANE, F. R. (eds.) *A Century of Family Law 1857–1957.* London: Sweet & Maxwell Ltd., 1957. Pp. xviii, 459.

The appearance of a book with the above title, edited by distinguished jurists of King's College of the University of London, and prefaced by the Master of the Rolls, indicates in itself what changes have occurred in contemporary English legal thought in this field. But a few years ago there existed in England no topic of legal instruction called "family law." Reference was commonly made only to "domestic relations"; on the unacademic treatment of the topic, the leading work, bearing the same title, by Eversley, is illuminating. For the rest, only the law of divorce attracted attention. This, of course, is easily accounted for by the nature of an uncodified legal system, derived from case law, but nevertheless it can be justified neither by scientific nor pedagogical reasons. In contrast, for a considerable period, especially in London, the members of the staff of King's College, who are responsible for the publication of the present volume, as well as the members of the London School of Economics and Political Sciences, have decisively contributed to the recognition of an appropriate place for "family law" from a scientific and pedagogical viewpoint. In this, they carry forward the tradition of King's College, where, in the year 1847, the first course of university lectures for women was inaugurated, and at the same time, in addition, the tradition of the University of London, where as early as 1879 a new charter opened all degrees and positions to women and which for the first time elected a woman as chancellor, as vice-chancellor, and as professor. No better proof of the recognition of their endeavors by the public is to be found than the fact that the Right Honourable Lord Evershed wrote the foreword to the volume, thereby evincing at the same time the growing interest of leading members of the Bench in contemporary scientific problems.

This collection under review, composed of sixteen different articles, provides a wide and informative insight into British family law. Although it begins with the Matrimonial Causes Act of 1857, the main importance of which was the introduction in England for the first time of divorce by judicial decree, the book does not in any sense ascribe exclusive prominence to the law of divorce throughout, but gives appropriate and rational attention to all the single fields of family law. Moreover, the collection is not limited to "merely juristic" discussions, in a sense which had become customary, but is entirely open also for the underlying problems. Professor Graveson (p. 412) is right in citing the words of Birkett, L. J., that "The days are gone when lawyers could say that they lived in a world of their own into which particular social or political trends did not intrude." In this sense, particular attention is paid to the gradual recognition of the equality of women in this "Women's epoch," in a comprehensive study of the global history of British social and cultural relations. As this development is to be regarded as one of

the most revolutionary events in English social history during the last century, the reader will find a highly interesting and up-to-date survey, for instance, in the chapters by Professor Graveson, on The Background of the Century and The Future of Family Law, or of Mr. John Stevas on Women in Public Law, which are also well worth the attention of non-lawyers.

Other chapters, as for instance Law of Marriage, Legitimation and Adoption: Tort and Contract (Mr. C. A. Morrison), Evidence (Prof. G. D. Nokes), Family Settlements and Succession (Prof. F. R. Crane), Matrimonial Tribunals and their Procedure (Mr. A. K. R. Kiralfy), Matrimonial Relief (C. E. P. Davies), Conflict of Laws (A. J. Bland), by their nature are more concentrated on strictly legal questions. All of these evidence the great care, impressive expert knowledge, and excellent sense of judgement of their authors. Thus, at the same time, they offer to the reader, although the book is not designed as a textbook, an at times most detailed scientific insight into English law. Also, of special interest for the readers of this periodical, particular references to foreign regulations appear in many places, for instance, in the contributions by Mr. James, Mr. Kiralfy, and Mr. A. J. Bland. All in all, however, the book concentrates, in accordance with its title, on the treatment of English law.

Moreover, the chapters which deal more with legal questions in the technical sense are not unrelated to the sociological, economic, and theological aspects of these problems. Thus, Mr. James, in his treatment of the English law of marriage, considers the canon law. This is most appropriate, because the Western marriage of our days is dominated by Christian ethics and dogmatics, as precipitated in the structures of the state. Their particular characteristic is that both religious and state marriage laws seek an exhaustive regulation, which should accurately prescribe, in accordance with the commands of Christian doctrine, above all the conditions of marriage, its formation and dissolution, reserving determination of its validity, and possible divorce, for a judicial proceeding. On the other hand, it is necessary for the understanding of the Roman conception of marriage to isolate it from all modern concepts. The Roman marriage was not founded upon a legal guarantee, but was instead based, in correspondence with the conservative character of the Romans, on usage. Neither was the conclusion of marriage bound by a strict legal form, nor was an action available for the declaration of marriage or for divorce. Legally, divorce was at any time available to either party. This peculiar extralegal character of the Roman marriage stands in sharp contrast to the Western-Christian view. Therefore, it is not convincing when, in the book under review, Roman law, canon law, and the English legislative enactments from 1857 to 1950 are referred to as the bases of the present British marriage laws. (p. 24.)

The following sentence likewise, in its generality, gives food for serious doubts, that "Roman civil law was all pervading in respect of matrimonial causes throughout civilized Europe until about the fifth or sixth centuries, when ecclesiastical law came into its own." As a European also I must unfortunately admit that in the fifth and sixth centuries a "civilized Europe" outside the Roman Empire was unknown. Moreover, precisely in the field of marriage law, Roman law did not obtain "throughout Europe," *inter alia,* just for the reason that the Romans did not regard marriage primarily as a

legal relation but as a social fact. Finally, the beginnings of ecclesiastical law, which were developing during the fifth and sixth centuries, may by no means be included under the same heading with the above-mentioned primary rules of canon law. The basic principles, such as the doctrine of the nature of the sacrament, the requirement of exclusive jurisdiction, etc., were first established in the canon law as it developed after the tenth century.

Thus, the picture is essentially more differentiated than this brief reference allows one to suppose. The same applies also to the short references to the early history of marriage. Consideration of the important works of scholars, who, incidentally, were also closely connected with England, as, for instance, Eduard Westermarck, Bronislaw Malinowski, and Hobhouse–Wheeler–Ginsberg, would have substantially enhanced the treatment of the subject matter. These writers have superseded the ethnological studies of Friedrich Engels in essential respects, so that in any event, reference to him alone no longer answers to the present position of science.

Finally, from the viewpoint of the reader of this Journal, the observations of Mr. A. J. Bland on The Family and The Conflict of Laws merit particular interest. Through a precise exposition of the legal situation and its evolution, he brings out in an exemplary manner parallel tendencies in the substantive and international law. Admittedly, in this sphere, the principle of equality of the sexes has not as yet been completely realized. Consequently, it appears uncertain whether, for example, differences between men and women will be maintained in the future with respect to the doctrine as to domicil. Also, the unilateral reference to the domicil of the husband or father does not conform to the principle of equality. If it is not desired to eliminate the unity of the family, for which indeed there are good arguments, for instance in tax law (*cf.* The Enforcement of Financial Provisions by J. L. Barton), there is no alternative other than a more detailed differentiation. For this a solution is offered by an approximation and combination of the principles of nationality and domicil, in order to find the best ultimate common connecting factor for the spouses. The most recent legal-political tendencies on the Continent also are moving towards such an untheoretical synthesis of principles once regarded as contrary opposites.

In general, the sixteen essays in the book reviewed constitute a most useful contribution to English family law. The editors, through their clear exposition of local and foreign laws, have performed a valuable and substantial service. It would be most desirable that they should carry forward their ground-breaking work in the future. Perhaps it is allowable to hope for the appearance of a new edition after the lapse of some ten years, which will both give an account of what is accomplished meanwhile and also set forth proposals for what is still to be achieved.

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Kennedy on Civil Salvage. 4th ed. by Kenneth C. McGuffie. No. 7 in The Library of Shipping Law. London: Stevens & Sons Ltd., 1958. Pp. xl, 442.

The four editions of Kennedy are spaced 1891, 1907, 1936, and 1958. Kennedy is the recognized British authority; it is good to have it brought up to

date, after the cases of the second world war 1939–1945 have been concluded and put into the books. Mr. McGuffie has done a devoted work, as befits the Registrar of the Admiralty Court in London; he has received wide co-operation, as the impressive list of acknowledgments indicates.

A few remarks may be useful to American readers. There are no cross-citations to the English Reprints, in which the older cases, scattered through numerous English reporters prior to the era of Lloyds List Law Reports can almost all be found. The English Reprints Table of Cross-references will solve this problem. Curiously, there is no reference or index-location of the statute of 1911 which enacts the Salvage Convention of 1910; it is not even listed under its soubriquet of Maritime Conventions Act. The law is discussed as an assemblage of cases, even 47 years after both an international convention and a statute have cast most of the propositions into codified form. The case-law habit is persistent. The important 2-year time limit upon salvage suits is not mentioned in the table of contents nor in the index; it is mentioned at the bottom of page 353. The fact that the Foreign Office caused the Salvage Act to be legislated throughout the British Empire shortly after 1911 receives no recognition; it is increasingly important as many parts of that Empire achieve independent status within and without the Commonwealth and take their well-prepared statutes with them into their new existence. The directors of the old Foreign Office deserve great credit for their wise management. The further fact that 36 other nations, including both the U.S.S.R. and the U.S.A., have ratified the 1910 Convention and have the same salvage principles as England, might properly be mentioned, without immodesty, although Judge A. R. Kennedy refrained from doing so in 1936. In other statutory respects, the McGuffie-Kennedy is excellent, and it will quickly become a leading authority in this field. As a case-law presentation, it is outstanding.

ARNOLD W. KNAUTH

SELMER, K. S. *The Survival of General Average. A Necessity or an Anachronism?* Oslo: Oslo University Press, 1958. Pp. 312.

The sub-title states the question: *A Necessity or an Anachronism?* Mr. Selmer examines the question with great patience and skill, basing his economic conclusions on the record of the entire Norwegian overseas fleet for the year 1952 and on ten years of adjustments at the Port of Gothenburg. 84 Norwegian adjustments and 367 Swedish adjustments afford a pretty good basis for an economic survey. London adjusters will have their own ideas; and American adjusters will notice the repeated remark that the cost of adjusting is high in the dollar area, and that the 2 per cent allowance of the dollar tag increases the disparity. It may be said at once that General Average emerges very well when there are few cargo interests, as in an oil-tanker case, or in bulk-dry-cargo cases. The adverse views are aroused in some liner-cargo cases, when hundreds and even thousands of packages have to be surveyed and valued for purposes of apportionment.

The equitable basis of General Average apportionment is unquestionable. Mr. Selmer states it at page 121: "One may perhaps establish that it is not very *practical* to effect an apportionment every time salvage costs benefiting several

interests have been incurred. But one can never establish, or even contend, that it is *equitable* to do away with the distribution." In a word, if my parcel is intentionally destroyed in order to save your parcel, it must be equity that you contribute *pro rata* to my loss. The equity character of General Average, like that of Salvage, is firmly embedded in the law merchant and the general maritime law; it is centuries old, and modern science has not affected its validity.

Mr. Selmer recognizes the criticisms, as far back as 1877, when the advent of the iron and steel steamer and the parcel bill of lading liner began to dominate ocean carriage. It is true that the railways have never had the General Average institution; but a train is a string of small car-vessels and not a unit within one hull, and it is seldom that all the cars of a train and their contents are equitably influenced by a fire or derailment of one or two cars. The adjacent cars are seldom "voluntarily sacrificed"; they are merely uncoupled and hauled away. The contents of a cargo plane are intimately bound together, as in a ship hull; but the largest cargo plane is only a small ship, and it is rare that the voluntary sacrifice of one lot of cargo may save other cargo; usually all perish together. Voluntary sacrifices in air carriage are more likely to be made by the aircraft, by dumping fuel or making a belly landing.

Commencing with a definitely hostile approach, and working tenaciously through one aspect of the problem after another, Mr. Selmer emerges with the conclusion that the institution of General Average is here to stay, and that the modern criticisms and difficulties should and can be met by some modifications and reforms. Abandonment of the institution will not cause the problems to vanish; they will merely have to be met and solved by other methods, few if any of which may prove to be quicker, cheaper, or otherwise superior.

No such study, to this reviewer's knowledge, has ever been made. The job has been well and carefully done. The well-known views of the Gothenburg adjuster, Mr. Kaj Pineus, have been fully evaluated. When the York-Antwerp Rules, now in their 1950 version, are next overhauled by the International Law Association or its daughter the Comité Maritime International, the Selmer volume will be in every delegate's pocket, and its contents will be an important part of the mental stock of his mind.

American readers will notice that the bibliography does not mention Benedict or Congdon, Robinson or Winter, nor even the older Hughes and the recent Norris. The book-famine produced by years of war and economic crisis have greatly hindered the distribution of American legal literature in Europe. Our foundations might well increase their efforts to equip European libraries with more American legal literature, alongside of the efforts to increase our own knowledge of what the law men of other countries are saying and doing.

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MING-MIN PENG. *Le Statut Juridique de l'Aéronef Militaire*. The Hague: Martinus Nijhoff, 1957. Pp. 129.

The subject matter of this study is the legal status of military aircraft. In the first part, the author deals successively with the history of aircraft classi-

fication, the definition of military aircraft ("aircraft operated by a State for military or hostile purposes"), the registration of the aircraft and the licensing of the crew, the legal position of military aircraft over the high seas, territorial waters, foreign territories, and aboard warships. The second part is mainly dedicated to the problems arising in connection with neutrality in times of war and ends with two short chapters on the transformation of civil into military aircraft and on the application of the "Alabama" rule in air law.

The problems treated by the author are the more interesting as the law is still unsettled in many points which are of some consequence for neutral countries, and the study offers a very good general survey of the historical development and the present situation. Not very much more, however, and many chapters break off somewhat abruptly at the point at which the reader would be interested to know the author's own opinion and proposals. He duly calls attention to the evident parallels of maritime law, but the fundamental differences which exist in the operational background are in general only hinted at and remain without a thorough analysis. The unusual amount of misprints is as regrettable as is the omission of valuable German literature and of the years of publication in the bibliography.

Summing up: A very valuable introduction into a vast and thus far somewhat neglected domain of air law, a very good survey of the historical development and the present status of the problems connected there, without, however, leading in itself very much further.

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KLINGHOFER, H. *Mishpat Minhali* (Administrative Law), Part One. Jerusalem: "Mif'al Hashichpul," 1957 (Faculty of Law of the Hebrew University, Legal Studies No. 2). Pp. 154.

SILBERG, M. *Ha-Ma'amad ha-Ishi b'Israel* (Personal Status in Israel). Jerusalem: "Mif'al Hashichpul," 1957 (Faculty of Law of the Hebrew University, Legal Studies No. 4). Pp. 454.

These studies are part of a series of lectures in the Hebrew University's law faculty, published by and for the students' organization. Other volumes so far published in the series include A. Levontin's study of *Marriages and Divorces Performed Abroad* (No. 1) and S. D. Goitein and A. Ben-Shemesh's *Moslem Law in Israel* (No. 3). The relative importance of questions of personal status and the preoccupation with conflicts of law suggested by these titles are characteristic of a country with an extraordinary variety of legal traditions and jurisdictions.

Justice Silberg's book considers the law of personal status in Israel under two headings. The first part discusses the legal structure established under the Palestine Mandate and, for the most part, retained by the State of Israel, as interpreted by the courts of Palestine and Israel. The second part deals with the major revisions of this structure by the Israeli legislature, in particular with the Law of Equality of Women's Rights of 1951 and the Law of the Jurisdiction of Rabbinic Courts (Marriage and Divorce) of 1953.

From the point of view of comparative law, the treatment of personal status in Palestine and in Israel presents a highly complex picture and derives from a great variety of sources. The Israeli legislators in early enactments retained the bulk of the structure of law set up by the Mandatory. That structure in turn was based on an Order in Council which, while adding the common law and even British statutes (at least on questions of judicial procedure), retained the Ottoman legal system as the major source of law regarding personal status. The Ottomans, for their part, not only recognized the Moslem customary law and *sharia* courts for a wide range of questions of personal status but granted the right of recognized religious communities among the Christians and Jews to have certain questions of personal status judged by their own religious laws and tribunals. Besides this, the Ottoman Civil Code applied to all Ottoman subjects, in regard to certain types of inheritance, a general law of succession derived from German inheritance law. Moreover, foreign residents in Palestine who were not Moslems were judged by the civil courts in accordance with their personal status as defined by their own land, and, in the case of divorce suits, could not be judged in the courts of Palestine at all.

The possibilities of conflict arising from such a variety of legal traditions were compounded in the case of the Jewish community (as well as the Christian communities) under the Mandate by the fact that for many matters of personal status the civil and religious courts had concurrent jurisdiction. Moreover, the definition of a member of the Jewish community whose personal status came under the jurisdiction of the rabbinic courts, whether exclusive or concurrent, was a source of difficulty. For the test of membership was registration as a member in accordance with specific provisions of the Ordinance regarding the Jewish community which not only restricted membership to adults in principle but, in practice, made possible large-scale evasion of the rabbinic courts' decisions on grounds of improper registration. A radical solution of this difficulty was achieved in 1953 by the Law of the Jurisdiction of Rabbinic Courts (Marriage and Divorce), establishing an exclusive jurisdiction over all Jews in Israel, whether citizens or residents, in matters of marriage and divorce. The definition of "Jew" under this law was then, of course, to be found in the legal tradition of the Talmud and its commentaries.

The Law of the Jurisdiction of Rabbinic Courts thus strongly reinforced the position of Jewish traditional law in Israel. An earlier law concerning the equal rights of women imposed upon Israeli courts, including the religious courts, modern principles opposed to the rules of the Talmudic as well as other traditional religious laws.

Klinghofer's book on Administrative Law does not, like Justice Silberg's study, present a detailed and comprehensive description of the special aspects of Israeli legislation. A major purpose of this small work is to instruct law students in the theories of Kelsen relating to administrative law, so that much of the book is devoted to general principles rather than to the specific features of Israeli practice. Also, the book represents Part One of a complete course on Israeli administrative law and concerns itself, therefore, with the most general elements of administration as a legal matter in Israel, leaving an account

of the particular administrative policies and procedures of the country for a second Part. Even within a brief compass, however, it is evident how open Israeli lawyers are to suggestions from a wide variety of sources: French, British, German, and American practices and doctrines are continually cited. The advanced stage of socialization in Israel also places it in an advanced position in the application of administrative legal concepts, so that current controversies in this field culled from all modern industrial countries are here discussed as matters of immediate relevance.

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GERATS, H.–LEKSCHAS, J.–RENNEBERG, J. *Lehrbuch des Strafrechts der Deutschen Demokratischen Republik. Allgemeiner Teil.* Berlin: VEB Deutscher Zentralverlag, 1957. Pp. 709.

MAURACH, R. *Deutsches Strafrecht. Allgemeiner Teil. Ein Lehrbuch.* Karlsruhe: C. F. Müller Verlag, 1954. Pp. vii, 795.

These two fat volumes were produced by four German professors from both sides of the line splitting Germany into two political units, and are of signal interest. The East German *Lehrbuch* is the first theoretical study to appear since East Germany was turned into a soviet-type state and society. Professor Maurach's *Strafrecht* came out at the moment when the Federal Republic became, at least in the eyes of the West, the continuator of German statehood and the bearer of its sovereignty. The character and nature of the East and West German regimes are reflected in the criminal law of the two Germanies, and it is somewhat symptomatic that both the *Lehrbuch* and the *Strafrecht* place great emphasis on the fact that the principle of *nulla poena sine lege* has been restored to its former place in German criminal law.

The dean of French criminologists, the late Donnedieu de Vabres, once called Italy the fatherland of criminal law. The same applies with equal or perhaps even greater force to Germany, where the very emergence of the modern criminal law may be credited largely to the activities of German professors, whose role was to provide the momentum which in other countries, as for instance France or England, comes from movements for social reforms. The debt of Italian and German criminal law to the scholars of those two countries, who enacted the teachings of the sociological, positivist, or normative schools into their legal systems, is indisputable. Those who are familiar with the writings of the German scholars active in the Federal Republic would probably agree that this tradition continues there as strong as ever. Professor Jeschek's little study on the reform of criminal law (*cf.* this Journal Vol. 7 (1958) p. 300) makes it quite clear that German jurists have resumed their traditional labors in this field. Whether this is so in East Germany is not so certain, and the importance of the *Lehrbuch* lies also in the fact that it provides some answer to this question.

But the significance of the work of the three East German professors clearly transcends the local scene. Germany was the native country of Marx and was always a center of socialist and communist theoretical thought. It has gone through the entire cycle of historical development, acquiring the legal insti-

tutions of capitalist society, which have been lacking in Russia, in particular in the field of criminal law, as the Tagantzev Code, even on the eve of World War I, remained mostly a theoretical proposition, and each estate continued under its own criminal law. Compared to similar studies of criminologists from "socialist" countries (not excluding the Soviet Union), the *Lehrbuch* represents a serious effort to construct a theory of socialist criminal law produced with the use of the most scholarly apparatus, rich references to jurisprudential writings, and fewer references to Marx, Engels, Lenin, and Stalin than appear in the majority of similar works from the Soviet orbit.

The work of the three East German professors opens with an important historical introduction reviewing the development of German criminal law beginning with the criminal law of the exploiting classes and ending with East German Democratic criminal law which is declared to be the law of the socialist order. The three parts which follow deal with the general principles of criminal law, the phenomenon of criminal offense, and the system of punishments.

The criminal law of the East German Democratic Republic is still based on the Code of 1871, which is also the law of the Federal Republic. It is supplemented with various enactments, largely consisting of the regulations of the occupation authorities either issued by the Allied Control Council or, for the Soviet occupation zone, the Soviet military authorities. It was only after Germany was organized into a republic that East German laws began to go into force. However, despite the diversity of the East German laws, our authors are inclined to regard it as an ideologically uniform legal system.

The answer to this is in the basic tenet of the doctrine that all law is class law. Consequently, the inherited law becomes socialist law by virtue of the fact that a socialist governmental and economic order has been introduced and that the working class controls the state. The seizure of power was followed, as our authors explain, by the purge of public administration, the punishment of war criminals, and the re-establishment of the democratic legal principles such as *nulla poena sine lege,* and the prohibition of analogy in the prosecution of crimes. This stage was achieved through the regulations issued by the Allied Control Council, which applied in West Germany. The transition to socialism was achieved mainly through the regulations issued by the soviet military authorities.

On closer analysis, it becomes clear that the general characteristic of socialist enactments, whether Soviet or East German, since the establishment of the socialist republic, is that criminal sanctions are directed against those who were affected by the nationalization of their property or who manifested opposition to the change of regime. In other words, the political repressive purpose is the only prima facie distinguishing visible feature of the socialist legislation.

According to the East German professors, criminal law is a result of the division of society into classes, a means to preserve the rule of the dominant class. Our authors admit that bourgeois law is couched in terms affording general protection to certain interests—property, life, etc.—but fails to protect the weaker classes from the effects of the capitalist system of economy in

which the economically stronger squeeze out the weaker elements from the class of owners and reduce them to proletarians. The capitalist form of expropriation was not only not prohibited but received the protection of the law.

In its last stage, the imperialist, our authors state that new tendencies in the field of criminal law are represented by the doctrines of three schools: anthropological (Lombrosian and Neo-Lombrosian), sociological (Franz Liszt), and normative. All these schools, our authors assert, are, in fact, dominated by a common tendency to undermine the supremacy of the law in favor of the arbitrary powers of the courts needed for the more effective suppression of the rising tide of opposition.

A closer examination of the socialist theory of criminal law, as put forward by the East German professors, discloses, however, that its legal concepts represent haphazard borrowings from either the sociological school (social danger) or the normative school (normative acts). Although East German scholars may claim that the principle of *nulla poena sine lege* has been restored in the German criminal law of East Germany, it is honored more in breach than in observance, as its courts have departed from a strict interpretation of their statutes. In addition, Article 6 of the East German Constitution of 1949 has been made into an omnibus rule, permitting the punishment of any act which for one reason or another is considered dangerous for the regime. In the final analysis, the *Lehrbuch* does not give a socialist theory of law, and in this respect our professors have failed just as thoroughly as their Soviet and satellite colleagues before them, although in a more scholarly manner.

Professor Maurach wrote the general part of his *Strafrecht* to serve both law schools and practicing lawyers, convinced that separation of theory from practice is neither wise nor practical. Three parts of the book deal, in a somewhat orthodox manner, with the general principles of criminal law, crime, and punishment. The person of the criminal is never lost sight of, as his personal characteristics determine the operation of the entire criminal law, predicated upon the nature of the criminal and the purpose and severity of punishment.

The complexity of the legal problems facing a German jurist today is best illustrated by a comparatively simple question as to what constitutes German criminal law. The German legal order was substantially modified by the regulations of the Allied Control Council, of which some are still in force. The law of East Germany, with all its problems, is also considered by the West German courts as part of the German legal system. Another complication results from the distribution of governmental and legislative powers between the *Länder* and the Federation. Rules of conflict thus become one of the basic tools of juristic operations.

Professor Maurach discusses each issue in the light of jurisprudential doctrines, historically treated legislative enactments, and current court decisions. Historical perspective is restricted to the nineteenth century which, as well as for other reasons, is perhaps justified by the fact that the criminal law of Germany originated with the liberal movement and its demands for reform. In his somewhat anxious endeavor to trace the beginnings of the institutions

of the German criminal law to purely German origins Professor Maurach somewhat underestimates the foreign influences.

Professor Maurach's book is a learned and important work, beautifully organized and written with great precision and economy of space. One may doubt the usefulness of some of the theoretical analyses and reviews of jurisprudential opinions, but, as Professor Maurach's book is designed to serve the student, some pedantry in this respect is not amiss.

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VÁLI, F. A. *Servitudes of International Law. A Study of rights in foreign territory.* New York: Frederick A. Praeger, 1958. Pp. xvi, 349.

A second edition of a monograph in international law is a rare event indeed. On two grounds it is eloquent proof of the merits of the author. Not only should he deal with a subject in a way that more readers should wish to be familiar with it, but he must also have the foresight to select a subject the importance of which is not diminished by the passage of time. From both these aspects, Váli's book fully merits a second edition. If anything, the importance of servitudes has increased since the first edition in 1933. This is especially true in respect to the installation of military bases and of guided missiles proving grounds, as evidenced by the voluminous chapters dedicated to these topics in the second edition.

In order to deal with his topic, the author has selected a combination of the deductive and inductive methods. His first chapters, although ostensibly concerned with definitions and with the history of the notion of international servitudes, really amount to a deductive approach to the subject. I must confess, however, that I really began to enjoy the author's book only when he began to discuss the various types of servitudes in international law. His admirable analysis of practical cases leads to sound, sensible, and easily-understood conclusions. I fully agree with the author that the notion of servitudes in international law does correspond to something, which really exists in international law but has hardly anything but the name in common with the "servitudes" known to Roman law. The notion covers rights in foreign territory of a varying degree of intensity, some almost indistinguishable from mere contractual obligations, as, for instance, some rights to fish in foreign waters, while in other cases the rights granted are so extensive as to approach the notion of "administration of foreign territory," as are certain agreements for military bases. The author discusses all these various kinds of "servitudes," giving well-chosen examples.

Although the work has been brought up to date as far as most of the new developments are concerned, one would have wished him also to mention the latest developments in some problems, which he treats only in a pre-1939 context. Thus, there is no mention of the post-1945 sequel to the situation at Kehl, nor is the Saar treaty of 1956 mentioned in connection with mining rights. An interesting problem, which may have escaped the author's notice, as it was only discussed in the Austrian dailies and settled by unpublished administrative agreements, concerned Austria's right of road transit through

Berchtesgaden. Austria's grievance was that Germany attempted to enforce German laws concerning compulsory accident insurance in respect to this traffic. Such insurance exists also under Austrian law, but the ceiling and also the insurance rates are considerably lower.

Respecting some statements of the author on other points of international law, I find myself in disagreement. I do not think that it is an open question whether or not a state may do what it likes with waters on its own territory, irrespective of any injury it may inflict thereby upon its neighbor (p. 153). Such action would be contrary to international law. I think also that the fact that a certain clause appears again and again in a good number of treaties may be just as well adduced as an indication, declaratory of a rule of customary international law, as also a proof to the contrary.

IGNAZ SEIDL-HOHENVELDERN

ERMACORA, F. *Österreichs Staatsvertrag und Neutralität.* Vol. XXV of "Dokumente" edited by Forschungsstelle für Völkerrecht und ausländisches öffentliches Recht der Universität Hamburg; Institut für Internationales Recht an der Universität Kiel; and Institut für Völkerrecht der Universität Göttingen. Frankfurt/Main—Berlin: Alfred Metzner Verlag, 1957. Pp. 116 and two maps.

The conclusion of the Austrian State Treaty of May 15, 1955 (TIAS 3298, 49 AJIL (1955) Off. Doc. p. 162), was not only of great importance to the partners of this treaty, but the German Federal Republic was also greatly affected thereby, although it was no partner to the Treaty. By the provisions of this Treaty, the Allied and Associated Powers transferred German assets in Austria to Austria and prohibited any return of large categories of such assets to their former owners; on the other hand, the Treaty contains Austria's declaration of neutrality, made pursuant to Austrian offers during the last stages of the negotiations, a topic often raised in the bitter inter-German debates as to whether the German Federal Republic should follow Austria's example in this respect. In view of these vital interests, it seemed important to present to the German public the relevant texts with summary comments in the shortest possible time. The present book is the result of these efforts. In a short historical introduction, it gives an account of the many vicissitudes of the conclusion of this Treaty (which was negotiated on and off for ten years) followed by the text of the Treaty itself as well as by the texts of the little known Anglo-United States-Austrian and Franco-Austrian "Vienna Memoranda" of May 10, 1955, which are of vital importance for Western oil interests in Austria, as well as the text of the Austrian Neutrality Law. The author, moreover, reproduces relevant Austrian parliamentary and diplomatic documents concerning this Law and these agreements.

As far as Ermacora's own comments are concerned, they seek to prove that the Western Allies did not intend to transfer to Austria any property right in respect to the German assets in their zones of occupation. If Austria therefore wants to keep these assets (and in view of the provisions of the Treaty against the return of most of these assets to their former owners, there is no other choice), Austria should be bound to indemnify the former private

German owners. Ermacora misinterprets the clearly expressed intentions of the contracting parties of this Treaty and passes over the fact that Austria did not acquire these assets as a sort of gift but had to pay a very heavy price for them to the other partners of the Treaty and even to Germany, to the latter in the form of an Austrian renunciation of all outstanding Austrian claims against Germany and German citizens if such claims had originated between March 13, 1938, and May 8, 1945. The bitter Austro-German controversies caused by these provisions have since been settled by an Austro-German Treaty of June 15, 1957 (German Bundesgesetzblatt 1958 II p. 130; Austrian Bundesgesetzblatt Nr. 119, 1958).

In respect to Austria's neutrality, Ermacora maintains that Austria could repeal its declaration of neutrality without violating any rule of international law and that Austria, in spite of its neutrality, would have to assume all—even unneutral—obligations contained in the United Nations Charter. As Austria did become a member of the United Nations only after the enactment of the Austrian Neutrality Law, this law, according to Ermacora, is therefore abrogated by the Charter as *lex posterior*. There, too, Ermacora's views are in conflict with the official interpretation of these provisions.

IGNAZ SEIDL-HOHENVELDERN*

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KEMP, DAVID A. McI.-KEMP, MARGARET S. *The Quantum of Damages in Personal Injury Claims*. London: Sweet and Maxwell Ltd., 1954. Pp. xviii 462.

The Quantum of Damages. Volume 2: *Fatal Injury Claims*. London: Sweet and Maxwell Ltd., 1956. Pp. xviii, 326.

The difficult-to-predict cornucopia of the measure of damages in Anglo-American torts law is a constant source of concern for practitioners. This is particularly so in those jurisdictions which retain juries to determine damages awards, and it is accentuated in the vast bulk of cases which relate to automobile accidents where voluntary or compulsory liability insurance is a suppressed element in jury deliberations. Because the factors which determine individual damages awards must differ from case to case and even more so from jurisdiction to jurisdiction, where economic and social differences occur in addition to varying modes of trial, any collection of damages precedents must be approached with considerable circumspection. The authors of these two volumes do not accept the proposition that previous damages awards can be of no assistance in foreseeing the potential measure of damages for later claims. They are careful, however, to point out that previous awards can only serve as a guide to future decisions as each case must ultimately turn on its particular fact situation. To this must be added the important proviso that jury trials have been obsolete in most English civil claims cases for more than 20 years. Whilst this collection of cases is of undoubted worth in England, its value diminishes rapidly in proportion to changed circumstances in other jurisdictions.

The main purpose of these two volumes is to make readily available English cases on damages awards. As many of these included in the col-

lection are unreported, the most valuable material consists of cases culled by the authors from case transcripts and unauthorized reports. The brief introduction to each volume, including a discussion of general principles at the beginning of the first volume is no substitute for a comprehensive work such as Mayne on Damages. The real value lies in the excellent coverage of individual damages awards. In Volume I detailed treatment of particular injuries with references to over 200 cases is a most satisfactory guide for any English practitioner, particularly in relation to planning settlements. The same can be said for Volume II which exhaustively lists the various heads of fatal injuries claims together with a selection of leading cases on miscellaneous matters in this field. There are also Life Tables, and other tabulated information for use by English practitioners.

In addition to their undoubted worth for English practice these collections may be of some assistance in those jurisdictions in the Commonwealth which place considerable weight on English decisions. Even so, in Australia for example, where there is still great reliance on English authorities, there is so much divergence in damages awards, particularly between those states which retain jury trials in automobile accident cases, and those that do not, that the addition of another set of award figures can hardly be expected to carry much weight. Perhaps the most important lesson can be gleaned from the authors' suggestions in a special appendix for a more stable basis for the assessment of damages. Pointing out that it is no wonder that awards made by juries fluctuate immensely when judicial awards frequently seem difficult to rationalize, the authors advocate that a permanent tribunal of experienced judges should be set up in England to make unappealable damages awards in difficult cases. This conclusion, based on experience in a jurisdiction in which civil jury trials are a rarity, merits double consideration where jury trials in civil cases are still the order of everyday litigation.

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Widerstandsrecht und Grenzen der Staatsgewalt. Pfister, B. and Hildmann, G. (Eds.) Berlin: Duncker & Humblot, 1956. Pp. 162.

This book contains a report of the minutes taken at the joint meeting that the *Hochschule für Politische Wissenschaften* of Munich held with the *Evangelische Akademie Tutzing* in June, 1955, at the latter's site on beautiful lake Starnberg. It is divided into two *Tage* (days): The *Erster Tag* dedicated to historical statements, the *Zweiter Tag,* a few pages shorter, to the present position of church and state philosophy.

Erster Tag: There reported: Johannes Spörl (Munich) on Thoughts Concerning the Right to Resist and the Assassination of Tyrants in the Middle Ages, concluding that the literature from pre-medieval times up to the new era defends resistance and permits the assassination of tyrants if absolutely necessary to re-establish the rule of law; sources from Cicero and Plato to John of Salisbury, Mariana, Grotius, and Leibniz are quoted. Of the greatest interest to the non-German reader will probably be the second *Referat* by Johannes Heckel (Munich) on The Position of the Church of the Reforma-

tion and the Lutherans. After a discussion of Bodin's criticism of Luther's negative answer, when the German princes questioned him about their right to raise arms against emperor Charles V in defense of their religion, Dr. Heckel explains that Luther—in agreement with Augustinus—regarded any temporal rulership, although ordained by God, as pertaining to Satan's jurisdiction, wherefore resistance, in conformity with God's command, can take place only on the spiritual plane i.e., in the individual Christian's conscience. Consequently, Luther grants a fullfledged right of complete resistance only in the case of a tyrant's meddling with the affairs of the Church, not in the temporal field. As is apparent, the debate circled, without using names, around the controversial figures of Niemöller, the leading personalities of the Confessional Church, and the men of the 20th of July, the day of the attempt on Hitler's life. However, even Luther was moved to abandon the doctrine of non-resistance in the physical sense in the case of the *tyrannus universalis,* who invades every sphere of the life of the state as well as of the individual. Dr. Heckel interprets Luther's viewpoint not to proclaim the principle: *Force breaks Law,* as a lefthanded acknowledgment of the preponderance of Law, but to establish the doctrine: *Might breaks Right.* Thereby, Luther prepared his adherents to combat the Emperor or the Turk, since in the reformer's eyes Charles V as well as the Sultan were about to invade Christendom's sphere as Luther understood it.

Referring to John Calvin's participation in French affairs, Ernst Wolf (Göttingen) explained that, like Luther, the great religious dictator of Geneva saw a basic problem in the command *ne resistatis malo* (Matth. 5, 39), and he taught that (1) since God will arouse avengers, the wronged Christian should pray for divine justice; and (2) the elected authorities, ephors, tribunes of the state—in modern language: agencies representing the people—have the duty to oppose tyrannical rulers (Inst. IV, 20, 31). Calvin's successors rather than the Genevan reformer developed more and more revolutionary theories which, through the Scotch *kirk* gained access into English thought and determined British law and history; on the continent, the French school of the so-called *Monarchomachs* laid the foundation for Huguenot ideas. The American speaker, Franklin H. Littell, offered a lecture on The Free Churches, The Sects, and The Right to Resist. More precisely than the German participants, Dr. Littell reminds his fellow protestants in Germany of their churches' unworthy position—or choice of position—at the high time of Hitlerism: he speaks of the so-called Free Churches, of the German Baptists and Methodists who, influenced by pietism, restricted themselves to serving the individual and the family and bowed to the State. Dr. Littell thinks that the Free Churches, at least in the Anglo-American orbit, represent the idea of democracy and by their decentralization are less vulnerable to state power and more capable of resistance.

Zweiter Tag: Walter Künneth (Erlangen) discussed the present theological situation in connection with the problem of *Widerstand,* or active resistance, which in his view always involves a conflict of duties; the conspirators of July 20 were still under the obligation of their oath to the Führer. Hermann Diem (Tübingen) is of an absolutely contrary opinion: The state being ordained by God and called to uphold His laws and order, it is a Christian duty to resist the state with all possible means if it violates its divine mandate.

The last report by Alois Dempf (Munich), also deals with the present situation, but from the viewpoint of political and legal philosophy. Dempf refers to the teachings of Max Scheler, Max Weber, and Ernst Troeltsch to back his opinion—in your reviewer's eyes more Christian than the learned utterings of the theologian-participants at the Tutzing conference—that there are absolute and self-evident values of the highest order in the law governing the state and the individual,—values originating, as it were, from a law above the law which he calls *überpositives Recht.*

Rupert Angermaier (Freising) deals with the Killing of a Tyrant from the viewpoint of Catholic doctrine, maintaining that God in His higher wisdom prevented the attempt of July 20 from being successful since the Germans might then have regarded Hitler as a martyr. Hermann Rauschning pointed especially to the new Hessian constitution which defines a right and even the duty to resist any attempt of violating its own essential principles. The speaker would like such an article to be inserted into the *Grundgesetz* of the Federal Republic. This, Peter Schneider (Bonn) contradicts, since the *Grundgesetz* has legalized the right to resist by providing for judicial review of any violation of the constitution, even in case of unconstitutional laws.

In concluding this review, we may say that the book is highly interesting and informative,—also on the German viewpoint. One of the most important publications in the field of responsibility, unfortunately, was not cited: H. H. Jescheck's *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (Bonn 1952, Röhrscheid), which would have assisted and streamlined the discussions.

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Book Notices

DECKER, G. *Republik Maluku Selatan. Der Selbstbestimmungskampf der Ambonesen.* Göttingen: Verlag Otto Schwartz & Co. 1957. Pp. vii, 239.

The present book is by the regretted author of one of the most interesting studies on the right of self-determination to appear during these last years (*Das Selbstbestimmungsrecht der Nationen*). In the volume before us, Decker examines only one case of use and abuse of this principle of self-determination: the case of the Republic of the South Moluccas. It was by invoking this right of peoples to self-determination that Indonesia separated itself from the Netherlands. Decker shows how the leading group behind this movement, who were mostly Javanese, gradually undermined and finally revoked the Federal Constitution, which the peoples of Indonesia had given themselves, when the Dutch colonial regime came to an end. The subsequent transformation of Indonesia into a centralized State chiefly dominated by the Javanese has undoubtedly been a source of considerable discontent, as evidenced by the 1958 revolts. It was also the reason which in 1950 prompted the Amboinese to invoke this same principle of self-determination to secede from this new Indonesian State, which in turn quelled this secessionist movement by force of arms, although according to Decker resistance continues in the interior of Ceram. The author gives a very well documented survey of all developments in Indonesia since 1939. As a matter of fact, more than half of the space is taken up by a very extensive documentary part. As the author remarks in his introduction, the Indonesian authorities did not co-operate with the author's research. Apart from UN documents he thus had to lean mainly on Dutch and Amboinese sources, hence, sometimes we hear only one side of a story. The struggle of the South Moluccans raises, of course, many interesting points of international law. As far as the right of self-determination is concerned, the author gives a very condensed version of the views advanced by him in his main work on this topic. The problem of secession from a federation upon a change in the balance of federal v. state rights (in the present case to a 100:0 balance), however, is treated in perhaps too summary a fashion—one would have liked to see some reference especially to the problems raised by the war between the States. The book contains a three-page summary in English.

IGNAZ SEIDL-HOHENVELDERN

DUCOS-ADER, R. *Le droit de réquisition. Théorie générale et régime juridique.* Preface by J.-M. Auby. Bibliothèque de Droit Public (IV). Paris: Librairie Générale de Droit et de Jurisprudence, 1956. Pp. xii, 540.

This prize-winning study by a young French scholar is devoted exclusively to the study of the phenomenon of requisition, mainly under French law. However, the author begins his research by tracing the origins of this institution back through medieval and Roman times. Moreover, he develops a general theory of the law of requisition, distinguishing this notion from somewhat similar duties to furnish services or goods for the public benefit, like military service or taxation. This part of his researches extends the importance of his work well beyond the scope of a mere study in French public law, the more so as the author also treats the problem of requisitions by an enemy army, although he is quite aware that

this institution has not too much in common with requisition under domestic law. As far as his treatment of the French law on requisition is concerned, it can safely be said that the author has succeeded in establishing a vivid, accurate, and complete picture of an extremely complicated subject, as the French law on requisitions is embodied in a bewildering multitude of laws, decrees, and court decisions. From a comparative angle, it is interesting to note how similar conditions created similar uses and abuses, which in their turn caused similar reactions. Most controversial topics in France as elsewhere have been the requisitions of housing space for purposes of sometimes doubtful public benefit ("officers' night-clubs," etc), the choice of a form of requisition entailing loss of the property for the owner concerned where a mere requisition of possession would have been sufficient, as well as the requisition of services of workers engaged in essential industries in order to forestall their intention to go on strike—all this often done under "war powers" at a time when the war was well over and when doubts could justifiably be voiced whether there exists some sort of national state of emergency at all. The reactions of French ordinary and administrative courts to such abuses were similar to the jurisprudence in other countries, fighting a moderately successful battle against an administration, which in wartime had acquired a feeling of omnipotence with which it was loath to part when times went back to normal.

IGNAZ SEIDL-HOHENVELDERN

VAN DAM, H. G.—LOOS, H. *Bundesentschädigungsgesetz. Kommentar.* Berlin/Frankfurt: Verlag Franz Vahlen GmBH, 1957. Pp. 978.

The German Federal Law of September 18, 1953, concerning compensation for victims of National Socialist persecution had been the subject of an earlier commentary by van Dam. In applying this Law certain shortcomings became noticeable which led to several amendments, which in turn led to the publication of a consolidated version of this Law, of June 29, 1956. Aided by several German civil servants who are familiar with the application of this law on the Federal and *Land* level, van Dam now publishes a commentary on this new law. As he and his collaborators were able to profit from the fact that a good number of the clauses of this law had been tested in litigation since the publication of the earlier commentary, the new commentary is of a very respectable size. It may safely be said, that it gives correct information not only on the wording of the law but also concerning its actual application by the German authorities. It thus constitutes a valuable source of information on a topic, which even with the passage of time is still of vital importance to many Nazi victims.

IGNAZ SEIDL-HOHENVELDERN

SZENIC, S. *Pitaval Warszawski.* Warsaw: Czytelnik, 1957. Pp. 337.

A common term for collections of famous criminal cases in civil law countries is "Pitaval," from the name of the French lawyer François Gayot de Pitaval (1673–1743) who first published his "Causes célèbres et intéressantes avec les jugements qui les ont décidées" in 1734.

In the "Warsaw Pitaval," Mr. Szenic, a lawyer and enthusiast of old Warsaw, presents the story of fourteen famous cases decided in the capital of Poland from 1524 to 1794. The second volume of the collection will include cases from 1795 to 1914.

Two of the cases collected were decided in the sixteenth century; four in the seventeenth; the rest originated in the eighteenth. Their importance was very uneven. Some were the outcome of well-known political events; the significance of others was only trivial for contemporary society, but for the twentieth century reader present much interest because of their background of old customs and beliefs.

The oldest case had its roots in the sudden deaths of the last two independent Masovian princes, Janusz and Stanislaw, in 1524 and 1526, after which Masovia was reunited with the rest of Poland, and the real cause of which was never discovered. The next one is the trial of the *"Raubritter"* Boniecki. The four seventeenth century cases include proceedings against Piekarski, assailant of King Sigismund III; against Chancellor Radziejowski and brothers Sluszka for leading a "private war" between these magnates; the trial of Lyszczynski, who advocated materialistic and atheist ideas; and the case against the Dominicans in Warsaw for maintaining commercial booths without proper license, resistance against authorities, and causing public disturbance.

The eighteenth century cases are the following: the murder case against Dabrowski for killing Zoltowski; the Strawinski affair, for "kidnapping" King Stanislaw Augustus Poniatowski; the murder case of General Puszet by his three servants; the trial of Mrs. Dogrum for poisoning; that of Poninski for treason, and a similar one against Ankwicz, Kossakowski, Ozarowski, and Zabiello; the affair of members of the Warsaw populace for hanging suspected traitors; and the case of Bishop Skarszewski accused of conspiring against the first modern European constitution, that of May 3, 1791.

The author made a thorough research in collecting materials for his book; for some of the cases, official records were available, but some are known only from secondary sources, chronicles, letters, and notes. For an historically minded lawyer, the cases are most interesting. The procedural delays, the interplay of legal rules and personal influences of the accused, and the severity of the judicial decisions come into bold relief. But the book offers thrilling reading not only for the members of the legal profession. The materials on history and *mores* of old times are abundant, and the cases are presented on the background of the period in which they took place.

All cases are criminal ones, and it is well known that not only jurists but the general public is attracted to famous penal trials. The "Pitaval" compares favorably with Conan Doyle, and beats his books in that it describes actual cases, as each of them did occur. And it is often true that the most daring imagination cannot match situations which life creates in its multifarious and frequently incredible set of circumstances.

W. J. WAGNER

GSOVSKI, V.—GRZYBOWSKI, K. (Eds.) *Highlights of Current Legislation and Activities in Mid-Europe.* Library of Congress, Mid-European Law Project, March 1957-March 1958.

Highlights is a monthly memorandum that reports on developments on a legal plane within the countries of the Soviet orbit. Lawyers from Albania, Bulgaria, Czechoslovakia, Hungary, Poland, Rumania, Yugoslavia, Estonia, Latvia, and Lithuania comprise the staff that creates this rather important publication. More than 600 pages dealing with law in areas such as labor, crime, insurance, property, and arbitration have been written in the course of the subject year; any survey of the contents must perforce be superficial. Perhaps the most common thread, linking all, if not nearly all, of the legal issues, is the thread of publicness. For the socialist precept pervades all areas, and everything is held by a private person in trust for the "people" or in private domain by explicit government permit. Even administrative agencies are deemed to be nothing more than a link in the chain of the general power exercised by the federal government. In pursuing the aim of effecting government and party policy, they must comply strictly with the orders of the executive branch of the government, and not be guided by the principle of obedience to law.

Private rights will be noted to have been subordinated to the interests of

socialist society, to the extent that private wealth has become governmental, and private ownership transitory. Contracts must serve the government economic plan, and marital relations must conform with socialist policy. Social insurance is solely a function of the State, and penal provisions and procedures have been made in many cases more stringent and demanding. The supremacy of the Communist Party; the transcendence of the principle of unity, rather than separation of power; the prevalence of the one-party system; the use of control over material goods as a device for controlling the population; the employer monolith that is the State; the imposition of legislation from above; and the supervision by secret police are some of the attributes that Milovan Djilas described in his polemic against Communism. The substantive content of much of the legislation reported in these pages, especially when contrasted with the legal frameworks that prevailed prior to Soviet incursions, tends to bear out in some measure the credibility of his asseverations. For, the chief editor notes, the decision in a case is ultimately controlled by the policy of those official and semi-official agencies which exercise the dictatorship, and not by precedent. A change in the policy of the government may at any time interrupt the chain of precedent.

HILLIARD A. GARDINER

BEACH, F. F.—WILL, R. F. *The State and Nonpublic Schools.* Washington: United States Department of Health, Education and Welfare, 1958. Pp. 152.

This publication deals primarily with State legal responsibilities for nonpublic educational institutions. It is the third of a series treating over-all responsibilities of a state for the education of its people. The first dealt with the structure and control of public education at the State level, and the second with the same issues in connection with publicly supported libraries. The role of the State department of education is emphasized in this volume. The constitutions, compiled statutes, and session laws of 48 States have served as the chief sources of data.

The first chapter, "Nonpublic Schools: Important Educational Resources of the Nation," is concerned with the size and scope of our nation's nonpublic educational resources. This includes tables of enrollment figures at all types of schools, further broken down into public and nonpublic figures. The second chapter, "State Regulation of Nonpublic Schools," is an analysis of State legislation pertaining to nonpublic schools. A brief analysis of the basic rights of nonpublic schools as defined by the U.S. Supreme Court is included. The theme of the third chapter, "State Constitutions and the Nonpublic School," is the state constitution and the provisions therein having direct bearing upon the regulation and supervision of the nonpublic schools. Public aid and tax exemption are some of the constitutional topics considered.

In chapter four, "State Department of Education Responsibilities for Nonpublic schools," the responsibilities assigned to State departments of education are considered in detail, pertinent statutory material and case law for each of 48 States being set forth in verbatim form in many instances. What the law is on establishment and supervision, compulsoriness of education, curriculum, records and reports, teacher certification, pupil transportation, health and safety, textbooks, school lunch, surplus property, scholarships, and the like may thus be ascertained, precluding the necessity, in most cases, for consulting the statutes in original form.

HILLIARD A. GARDINER

DARROW, C. *The Story of My Life.* New York: Grosset & Dunlap, Inc., 1957. Pp. viii, 465.

Clarence Darrow never achieved status as a truly legitimate legal philosopher because perhaps of the active life he led as a trial lawyer. But his views were sufficiently unique, and his cour-

age adequately unusual, to warrant reconsideration of the role he played in the social, political, and legal developments of his time. His personal perspectives are described in this autobiography, receiving attention once again because of the concrete viewpoints expressed and the interpretative content supplied. Darrow's roles in the famous Loeb-Leopold trial and the Scopes evolution case were merely vehicles for the expression of his coherent set of beliefs: that capital punishment was a form of legalized murder, that man was condemned for "getting out of step with the crowd, not for doing evil," that physical death and the persistence of memory were incompatible, and that skepticism, to the extent that scientific truth did not obviate its need, was the most integrious outlook. The essentially modest nature of the author is made recurrently apparent, as is his basic humanitarianism, liberalism, and egalitarianism. While to some Darrow will appear to have been nihilistic and fatalistic, his accomplishments bear perhaps greatest witness to a raging will to live and to an unparalleled generosity, unclouded by the pettinesses of most men, and unprejudiced by the determinism to which he avowedly subscribed.

HILLIARD A. GARDINER

HAMMERSCHLAG, H. E. *Hypnotism and Crime*. Los Angeles: Wilshire Book Company, 1957. Pp. 148.

The danger of being induced to commit crime while under hypnotic influence is the theme of this work, which in turn surveys the development of hypnosis and then scrutinizes some of the leading cases of unethical use of the suggestion device. Seduction, murder, confession, and stage suggestion are some of the conduct patterns examined. The author's conclusions, in the direction of which the text moves throughout, are that suggestion and hypnosis may certainly be used with crime in view, although only under exceptional conditions; that the disposition toward hysteria has diminished to be replaced by organ neuroses; that the misuse of this psychotherapeutic procedure by exhibitionists and showmen has forced the technique into disrepute and diminished trust in the hypnotist; and that the problem of ethical responsibility in the utilization of hypnosis is significant indeed, especially in light of the fact that its effects can be so cumulative and massive that a far-reaching exclusion of thought processes may result. The value of hypnosis as a psychical method of healing puts to task our own freedom of will in deciding to whom one should entrust oneself for such treatment and whether the professional ethics of the hypnotist makes it impossible for him to exploit interpersonal relationships.

HILLIARD A. GARDINER

DAVENPORT, W. H. (Ed.) *Voices in Court: A Treasury of the Law*. New York: The Macmillan Company, 1958. Pp. 588.

Voices in Court is the happy result of a pioneer course in literature and the law for students at the University of Southern California Law School. Thirty-nine authors contribute forty-four selections of marked intellectual acumen, eloquence, and readability. Prefacing each item is a concise introduction exemplifying Professor Davenport's sound editorial judgment and restraint. Short stories, essays, histories, biographies, letters, cases, trials, cross-examinations, and lectures are linked by the four major legal symbols of Lawyer, Judge, Courtroom, and Law; together they reveal that peculiar blending of precedent and dynamic pragmatism underlying our modern judicial system.

Charles Curtis's candid analysis of "The Advocate" is first and introduces the reader to the complex moral and ethical ties binding lawyer and client. Catherine Drinker Bowen's rapid prose then recreates Oliver Wendell Holmes' induction into the law, and Carl Sandburg evokes kaleidoscopic images of a youthful Lincoln trying his varied cases

on an Illinois county circuit. Famed trial-lawyer Clinton Brown's timely reminiscences of "The Jim Wheat Murder Case" describe a brand of Southern justice seldom making headlines, while Reginald Hine laments the loss of dramatic flair in deathbed departures and final testaments. Lord Macmillan concludes this initial section by stressing every lawyer's need of a clear, precise prose style through continual contact with great literary thinkers of the past. The great Scottish jurist is seconded in later selections by John Buchan, Learned Hand, Benjamin Cardozo, and literary critic John Mason Brown.

One such past literary figure is British historian Macaulay, whose chilling vignette of "Jeffreys the Hanging Judge," heads a parade of notable magistrates. John Marshall, for example, presents a first-hand account of his climb to Chief Justice, and Albert Beveridge analyzes "Marbury Versus Madison," by which Marshall established the Supreme Court's judicial role. Next, Judge Woolsey's monumental ruling on Joyce's *Ulysses* and Alpheus Mason's study of Holmes and Brandeis precede Felix Frankfurter's challenging summary of a Supreme Court Justice's essential qualities.

These qualities are exemplified by the fictional Judge Coates of James Gould Cozzen's *The Just and the Unjust.* The wise old judge's discussion with his lawyer-son prepares the reader for the shift to the Courtroom, where such literary practitioners of the law as Benét, Dickens, Trollope, and De Maupassant display their mastery of legal fiction. Fiction then gives way to history, as such dramatic masters of cross-examination as Edward Coke, Charles Russell, Edward Marshall Hall, and Rufus Isaacs try their most famous cases. Especially vivid are Edward Carson's battle of wits with Oscar Wilde in the notorious English trial of the nineties and Herbert Smyth's relentless interrogation of Mrs. Reginald Vanderbilt during a custody suit gaining international headlines not too many years ago.

But there is, as the editor points out, "more to law than the lawyer, the judge, and the courtroom . . . there is the theory of law and the relation of law and justice." Thus the final section presents the finest Western philosophic, legal, and literary minds theorizing on "The Law," and not necessarily in favorable terms. For instance, Montaigne's skeptical evaluation of both natural and social law is paralleled by Thoreau's famous resignation from a society governed by "unjust laws." Even Holmes decries the law's over-reliance upon reason and tradition, while Professor Lon Fuller illustrates allegorically its subjective basis. However, H. L. Mencken's diatribes against our modern legal codes seem petulant and dated compared to Arthur Vanderbilt's carefully structured plea for a more "rational attitude toward legislation as a mode of lawmaking." A final bonus for the now-awakened reader of legal literature is John Wigmore's bibliographic discussion and "List of One Hundred Legal Novels."

The voices heard here state clearly that the law is designed and administered by fallible men. Yet it is equally clear that many of them are wise and dedicated, for only such men could fashion from the emotional entanglements and business maneuvers of contemporary life a dynamic social force linking our basic, political, economic, and moral concepts. *Voices in Court* expresses this fusion of legal theory and practice, selflessness and fallibility with clarity, zest, and imagination. Anyone fascinated by the social evolution of man and his laws will read it with interest and pleasure.

BEN SIEGEL

PRICE, M. O. *A Practical Manual of Standard Legal Citations.* (2nd ed.) New York: Oceana Publications, 1958. Pp. vi, 122.

This is a new edition of this useful

manual, previously reviewed in this Journal (Vol. 3, at p. 302). It has been improved in detail, but, as the author states, "Few significant changes have been necessary, because the principles set forth in the earlier printings were sound." One typographical exception is noted on page 97, i.e., omission of spacing between elements of an abbreviation, following the new look in the GPO Style Manual. The reviewer observes that the official citation for the Code of Federal Regulations (CFR), excluded from the first edition, is now mentioned as "usual and acceptable to the United States Supreme Court," though the author still deems his private form as "more formal and proper."

H. E. Y.

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Mention in this list does not preclude a later review

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Bulletin

Special Editor: KURT H. NADELMANN

American Foreign Law Association

REPORTS

AMERICAN FOREIGN LAW ASSOCIATION: ANNUAL MEETING 1959—The 34th annual meeting of the American Foreign Law Association was held in New York City at the Vanderbilt Law Quadrangle of New York University on March 13, 1959. Mr. Otto C. Sommerich, president of the Association, was in the chair. A proposal to incorporate the Association was on the agenda. The draft of a proposed Certificate of Incorporation and By-Laws for the new corporation, approved by the General Council, was presented by Mr. Albert M. Herrmann and approved after discussion with one technical modification. The technicalities of incorporation are expected to be completed in the Fall of 1959, at which time a membership meeting of the incorporated Association will take place. The four members of the General Council whose term expires in 1959 were re-elected as the class of 1962 and all officers of the Association were re-elected by the General Council. A nominating committee was elected by the membership meeting composed as follows: Phanor J. Eder, chairman, David E. Grant, Victor C. Folsom, Arthur von Mehren, Max Rheinstein, members.

The business meeting was preceded by a discussion meeting on recent trends in codification of criminal law chaired by Associate Dean Miguel A. de Capriles. The principal speaker was Professor Gerhard O. W. Mueller of New York University who introduced materials taken from recent codification work in Europe and in Asia. Comments were offered by Professors John N. Hazard, Arthur von Mehren, and Max Rheinstein, who dealt with the Basis for criminal law in the USSR, the Rule of Law discussions at the Chicago and Warsaw round-tables of the International Association of Legal Science, and current German attitudes toward an international criminal law, respectively.

THE INTERNATIONAL JUDGES CONGRESS, ROME, OCTOBER 10-13, 1958—In October 1958, there gathered in Rome more than 1100 judges from 32 nations to attend the First International Judges Congress organized by the International Union of Judges. Apart from the substantive agenda of the Congress the mere fact of such a meeting has considerable significance. This was the first meeting on such a scale since the Union was organized in Salzburg in 1955. No comparable judicial meeting has ever before been held. It is therefore important on that ground alone.

The writer attended this Congress as the representative of the Institute of Judicial Administration and the Faculty of Law of New York University. Many countries were officially represented by members of their highest court. Dr. Ernesto Eula, Chief Justice of the Supreme Court of Cassation of Italy, presided over all meetings, and leading members of the Italian government and its judiciary addressed the Congress.

Reports, discussions, and debates on the two agenda topics constituted the official business, but private, informal talks between the judges of different

countries and different systems provided an exchange of ideas that was at least as valuable as the official program. The agenda topics were: 1. training of judges, and 2. international and supernational courts.

Topic 1 was primarily concerned with the problems of civil-law countries where a judgeship is more often than not a chosen career like other branches of civil service entered into early in the career of the law graduates after special training and competitive examinations. The continental judges showed great interest in the Anglo-American system's judicial independence, especially the life tenure of Federal judges and the relatively secure tenure of many state court judges. There was also much interest in Puerto Rico and the Philippines for two reasons: (1) these countries and their legal systems represent demonstrated United States policy on colonialism; (2) both had their early history under the civil law, with the common law, in a sense, being later overlaid on or blended with the basic system. This "blend" was the subject of much discussion, and the civil-law judges indicated great interest in the potentialities of adding the flexibility and viability of the common law to civil law systems.

The second agenda item—international courts—was closely followed by all the judges. While in the United States interest in this area is not great among judges, in Europe it seems to occupy a position in the forefront of the minds of a large proportion of the judiciary. This is more readily appreciated if we think of their problems in geographical terms where Italy, France, Austria, Germany, et al., are physically like Connecticut, New York, New Jersey and Pennsylvania. To this must be added the relatively recent European developments of the Coal and Steel Community, customs, water agreements, and those relating to atomic energy.

Wide interest was expressed in greater exchange of visits and consequently of ideas, between judges of the common law and code countries. No American judge can meet with the judges of other countries in a world wide meeting without a realization that without yielding on our belief in the fundamental common law concepts we can learn much from our brother judges in other countries. Every effort should be made to broaden these exchanges. I hope some means will be found to assure participation of American judges in future work of this Congress.

WARREN E. BURGER
Judge U.S. Court of Appeals
Washington, D.C.

SECOND INTERNATIONAL INVESTMENT LAW CONFERENCE—The Second International Investment Law Conference, sponsored by the American Society of International Law, was held in Washington, D.C. on November 21 and 22, 1958. As in the case of the first Conference held in February 1956, the attendance was large, with participants including not only lawyers and educators, but numerous representatives of business and international organizations. Over 350 persons registered and about 275 attended each of the three sessions. The Ford Foundation financed the expenses of the Conference including the printing and distribution of the proceedings to all registrants.

The Conference was divided into three sessions. The topic for the first session was "Existing and Possible Laws and Mechanisms Available in the United States for the Promotion of Private and Public-Private Investments Abroad." The session was chaired by Robert M. Campbell, General Attorney of the Ford Motor Company (International Division) who was also Chairman of the Conference. Robert C. Barnard, of Washington, D.C., reviewed some of the governmental institutions for assisting private and public investments abroad. Professor Kingman Brewster, Jr., of Harvard Law School, discussed certain pending proposals to

increase United States investments abroad by means of tax incentives. He was not uncritical. Mr. W.T.M. Beale, Assistant Secretary of State (Economics), reviewed the position of the State Department with regard to existing and possible new mechanisms for private and public investment abroad. He was fluent, interesting and restrained. Professor Wolfgang Friedmann, of Columbia University Law School, analyzed some of the existing international institutions and mechanisms for investment abroad.

The topic for the second session was "Foreign Laws Promoting or Hindering Private and Public-Private Investments Abroad; Nationalization." This session was chaired by Lester Nurick, Assistant General Counsel of the World Bank and International Finance Corporation. Major L.M. Bloomfield, of Montreal, gave a detailed analysis of the laws of Canada and the United Kingdom relating to investments there. Joseph Dach, of the Italian Economic Corporation, spoke about some of the investment problems in Europe, particularly in Italy. Eberhard P. Deutsch, of New Orleans, spoke generally about problems in Latin America, particularly with respect to expropriation and nationalization. George Winthrop Haight, of the Asiatic Petroleum Corporation, reviewed the legal situation existing in a number of countries of the Middle East and Africa; Matthew J. Kust, Washington, D.C., spoke about the investment problems in the Far East, particularly India.

The topic for the third session was "Existing and Possible New International Mechanisms for the Promotion of Private and Public-Private International Investments." This session was chaired by Stanley Metzger, Assistant Legal Adviser of the State Department. Kenneth Lowder, Treasurer of W.R. Grace & Company, and Victor C. Folsom, on behalf of the United States Council of the International Chamber of Commerce, Inc. addressed themselves largely to promotion of foreign investment from the point of view of the private investor. Ralph Golby, Counsel to the Development Loan Fund, reviewed the methods of operation and principles of the United States agencies and international organizations involved in promoting foreign investments. Martin Domke, substituting for Mr. Paul Herzog, Executive Vice President, American Arbitration Association, spoke about the advantages of providing for arbitration in international trade transactions, and Oscar Schachter, Director, Legal Division, United Nations, reviewed the subject primarily from the point of view of the United Nations.

The Honorary Chairman of the Conference Committee was Davidson Sommers, Vice President and General Counsel of the World Bank, and the Chairman of the Executive Committee in charge of the Conference was Edward L. Merrigan, of Washington, D.C. Many of the attendants at the Conference expressed the view that these conferences had proved to be of substantial interest and benefit and stated that they hoped that they would be held periodically.

LESTER NURICK

PRINCETON MEETING ON LAW REFORM IN THE MIDDLE EAST—A conference on "Law Reform in the Middle East" was held at Princeton University on November 28 and 29, 1958, under the auspices of the Princeton Program in Near Eastern Studies. The participants included academicians, businessmen, and government officials. Several papers were presented: Professor H.A.R. Gibb discussed "The Background to Reform: The Nature of the Sharī'ah." "The Early Reforms (1850-1915)" were taken up by Professor Farhat Ziadeh, who treated the Ottoman and Egyptian developments, and by Professor A.A.A. Fyzee, who covered the subject for British India. Professor J.N.D. Anderson of London University, whose presence at Princeton as a Visiting Professor provided the stimulus for calling the conference, spoke on "The Later Re-

forms (1915 to the present)." Dr. Saba Habachy rounded out the presentation by his remarks entitled "Appraisal and Prospect."

The conference was arranged so as to allow opportunity for discussion of each paper. A most interesting and stimulating exchange of views took place. The bringing-together of experts on Islam and the Middle East with persons trained in the law proved of advantage to all concerned.

ARTHUR VON MEHREN

ASSOCIATION OF AMERICAN LAW SCHOOLS ANNUAL MEETING—At the annual meeting of the Association of American Law Schools, Chicago, December 28-30, 1958, a round-table discussion was held under the auspices of the Committee on Foreign Exchanges of Law Teachers and Students, David S. Stern, University of Miami, chairman, on "Technical Aspects of Programming for Foreign Visitors" with Joseph Dainow, Louisiana State University, as moderator and Roy R. Ray, Southern Methodist University, and William W. Bishop, Jr., University of Michigan, as panelists; and on "New Developments in Teaching American Law Abroad" with Willard H. Pedrick, Northwestern University, as moderator and B. J. George, Jr., University of Michigan, John H. Crabb, University of North Dakota, and Arthur T. von Mehren, Harvard University, as panelists. Brunson MacChesney, Northwestern University and Jack B. Tate, Yale University, led the general discussion. A dinner meeting sponsored by the Committee in co-operation with the committees on Comparative Law and International Law was addressed by Roy R. Rubottom, Jr., Assistant Secretary of State.

ANNOUNCEMENTS

HAGUE ACADEMY OF INTERNATIONAL LAW—The 1959 Session of the Hague Academy of International Law will be from July 13 to July 31 and from August 3 to August 21, 1959. The Private International Law courses offered, all given during the first period, according to the announcement are: General Course (H. Batiffol); The Condition of Corporate Personality in Private International Law (J. Loussouarn); The Effects of Foreign Nationalization (F. Munch); Private International Law and the Scandinavian Conventions (A. Philip); The Legal Status of International Economic Organizations and the Municipal Law of States (A. P. Sereni); The Structure of the Rule of Conflict (P. Vallindas). The program may be obtained from the Secretariat, Peace Palace, The Hague.

VARIA

PEOPLE TO PEOPLE—For several years, a program has been carried on under the leadership of Chief Justice Robert G. Simmons of the Supreme Court of Nebraska of soliciting surplus law books from American lawyers and sending them to Bar Associations, court libraries and law schools abroad. This activity, under which some 18,000 volumes have been sent into 34 countries, now has been integrated into the People-to-People Program inaugurated by President Eisenhower in 1956. We are informed that requests are constantly being received from abroad by Chief Justice Simmons for law books, particularly books on Constitutional Law, Comparative Law, and International Law. Readers having such books (possibly earlier editions) to donate should write to Chief Justice Robert G. Simmons, Supreme Court of Nebraska, Lincoln, Nebraska.

AMERICAN FOREIGN LAW ASSOCIATION

Organized in New York on February 24, 1925,[1] the American Foreign Law Association has as its objects: the advancement of the study, understanding, and practice of foreign, comparative, and private international law, the promotion of solidarity among members of the legal profession who devote themselves, wholly or in part, to those branches, the maintenance of adequate professional standards relative to such members, and active co-operation with learned societies devoted to such subjects.[2]

The Association, which has branches in Chicago and Miami, is the United States national committee of the International Association of Legal Science.

Active membership in the Association is open to any one of good moral character, who, besides manifesting a special interest in the objects of the Association, (a) has been duly admitted to practice before the Federal Supreme Court or the highest courts of a state, territory, or possession of the United States; or (b) is a member in good standing of the Bar of a foreign country, or who is otherwise specially qualified in any branches of law to which the Association is devoted.

The affairs of the Association are managed by a General Council elected as stated in the Constitution. The Council selects a president, two or more vice-presidents, a secretary, and a treasurer, who perform the duties implied by their respective titles for the Association as a whole as well as for the Council.

The General Council is composed of: Miguel A. de Capriles, New York, Martin Domke, New York, Victor C. Folsom, New York, David E. Grant, New York, John N. Hazard, New York, Kurt H. Nadelmann, Cambridge, Mass., Max Rheinstein, Chicago, Ill., Otto Schoenrich, New York, Angelo Piero Sereni, New York, David S. Stern, Coral Gables, Fla., Ivan Soubbotitch, New York, Arthur T. von Mehren, Cambridge, Mass., and the administrative officers.

Officers are: Otto C. Sommerich, New York, president; Alexis C. Coudert, New York, George J. Eder, New York, W. Harvey Reeves, New York, Hessel E. Yntema, Ann Arbor, Mich., vice-presidents; Joseph Dach, New York, treasurer; Albert M. Herrmann, One Wall Street, New York 5, N. Y., secretary.

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[1] For the history of the Association, see 4 Am. J. Comp. L (1955) 320.

[2] See Constitution, as revised, October 17, 1952, 2 Am. J. Comp. L. (1953) 294.

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